15-5-307

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~1187~~. 689

THE UNITED STATES *EX RELATIONE* THE INTERNATIONAL CONTRACTING COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL S. LAMONT, SECRETARY OF THE DEPARTMENT OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 11, 1894.

(15,571.)

(15,571.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1187.

THE UNITED STATES *EX RELATIONE* THE INTERNATIONAL CONTRACTING COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL S. LAMONT, SECRETARY OF THE DEPARTMENT OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Supreme Court D. C.	1	1
Petition	1	1
Exhibit A—Advertisement for proposals for dredging the channel in Gowanus bay, N. Y., August 6, 1892	14	14
Proposal of the International Contracting Co., Sept. 8, 1892	18	18
B—Letter of Col. Gillespie to the chief of engineers, Sept. 16, 1892	21	21
C—Order of the Secretary of War, Jan. 18, 1886	21	21
D—Form of contract	22	22
E—Letter from Contracting Co. to Col. Gillespie, Dec. 21, 1892	25	25
F—Judgment of dismissal in Supreme Court U. S.	26	26
G—Letter of Secretary of War to A. S. Worthington *et al.*, Nov. 14, 1893	26	26
H—Order of the Secretary of War, February 9, 1889	27	27

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 12, 1894.

	Original.	Print.
Rule to show cause	29	29
Marshal's return	29	29
Appearance for Secretary of War	30	30
Demurrer to petition	30	30
Stipulation as to proceedings	31	31
Order sustaining demurrer and dismissing petition	32	32
Appeal to Court of Appeals	32	32
Citation	32	32
Bond on appeal	33	33
Clerk's certificate	34	34
Minute entry of argument	35	35
Minute entry of argument	36	35
Opinion	37	35
Judgment	41	42
Order allowing writ of error	42	42
Bond on writ of error	43	43
Writ of error	45	44
Citation and acceptance of service	46	45
Clerk's certificate	48	45

1 In the Court of Appeals of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY, Appellant,
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } No. 284.

Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
vs.
DANIEL S. LAMONT, Secretary of War. } At Law. No. 35208.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition. Filed December 4, 1893.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } No. 35208. At Law.

To the supreme court of the District of Columbia, holding a circuit court:

Your relator, The International Contracting Company, respectfully states:

I.

It is a body corporate under the laws of the State of New Jersey. The respondent, Daniel S. Lamont, is the Secretary of the Department of War of the United States of America, and has held that office continuously from the 4th day of March, 1893, to the present time.

II.

On and prior to the sixth day of August, 1892, Lieutenant Colonel George L. Gillespie was an officer in the corps of engineers of the Army of the United States and was stationed at the city
2 of New York, in the State of New York, in charge, under the chief of said corps of engineers and of Stephen B. Elkins,

who was then Secretary of the Department of War, of the work of dredging and otherwise improving New York harbor and adjacent waters, and said Gillespie has held said office and has been stationed at the city of New York in charge of said improvements since that date.

III.

Prior to the sixth day of August, 1892, it had been determined by the Government of the United States to dredge or cause to be dredged the channels in Gowanus bay, in the State of New York, and the Congress of the United States had theretofore appropriated a large sum of money for said work. On the sixth day of August, 1892, said Gillespie, by the authority of the chief of the corps of engineers and of said Secretary of the Department of War, prepared an advertisement inviting sealed proposals for dredging said channels in Gowanus bay, and immediately thereafter said advertisement was published in divers newspapers in accordance with law. Said advertisement is in the words and figures following:

"U. S. ENGINEER OFFICE,
ARMY BUILDING, NEW YORK, *Aug.* 6, 1892.

Sealed proposals for dredging the channels in Gowanus bay, N. Y., will be received at this office until 12 m. Sept. 14, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office.

G. L. GILLESPIE,
Lieut. Col. of Engineers."

IV.

Said advertisement came to the notice of the relator, and on the fourteenth day of September, 1892, and prior to twelve o'clock meridian on that day it delivered to said Gillespie, at his office in the city of New York, a sealed and properly endorsed proposal for doing the work called for by said advertisement, together with a guarantee signed by Alfred A. Howlett and Henry A. V. Post, and a justification of said guarantors. Said proposal was endorsed upon certain printed specifications relating to said proposed work. Said proposal, guarantee, and justification of guarantors were made upon blank forms, which, after said advertisement was published as aforesaid, were furnished to the relator by said Gillespie by the authority of said chief of the corps of engineers and of said Secretary of the Department of War, to be used by the relator in making a proposal in response to said advertisement, and said printed specifications were also furnished to the relator by said Gillespie by the same authority at the same time and for the same purpose.

A copy of said specifications, proposal, guarantee, and justification of guarantors is hereby appended, marked "Exhibit A," and made part hereof.

V.

Several other proposals for said work were received by said Gillespie after said advertisement had been published as aforesaid and prior to twelve o'clock meridian on September 14, 1892, and among them were several which did not contain the condition mentioned in the relator's proposal varying the time of beginning and the time of completing said work from the time mentioned in said specifications. At the hour of twelve o'clock noon on September 14, 1892, said Gillespie publicly opened all said proposals, including the proposal received by him as aforesaid from the relator, and thereupon the fact was and it was then and there found and determined by said Gillespie that the relator was the lowest bidder for the work. Afterwards and on or about the 16th day of September, 1892, said Gillespie transmitted all said proposals and accompanying papers to the chief of said corps of engineers at his office in the city of Washington, in the District of Columbia, and in transmitting said proposals said Gillespie in writing recommended that the contract for said work be awarded to the relator.

Said communication from said Gillespie and the said proposals and accompanying papers were duly received at the said office of said chief of engineers on or about the seventeenth day of September, 1892. Afterward on or about the nineteenth day of September, 1892, and at said office of said chief of engineers, in the city of Washington, said recommendation of said Gillespie was duly approved in writing by Major Henry M. Adams, an officer of said corps of engineers, who was then and there acting chief of engineers and was in charge of said office by virtue of a general order of the Secretary of the Department of War, made by authority of law and dated January 18, 1889.

A copy of said communication of said Gillespie and of said endorsement by said Adams is hereto appended, marked "Exhibit B," and made part hereof, and a copy of said order of January 18, 1889, is hereto appended, marked "Exhibit C," and made part hereof.

On or about the nineteenth day of September, 1892, said Gillespie was instructed by said acting chief of engineers to notify the relator that its said bid had been accepted.

On the twenty-second day of September, 1892, said Gillespie, in pursuance of said instructions, sent a written communication to the relator, which it received on the following day; which communication is in the words and figures following:

4 "Gowanus bay, N. Y.

"*Subject: Acceptance of Bid.*

"Lt. Col. G. L. Gillespie, corps of engineers, U. S. A., engineer office, U. S. Army, room F 7, Army building, 39 Whitehall street.

"NEW YORK, N. Y., *September* 22, 1892.

"Mr. Joseph Edwards, president the International Contracting Co., 16 Exchange place, N. Y. city.

"SIR: The proposal of the International Contracting Co., opened in this office Sept. 14, 1892, for dredging channels in Gowanus bay, N. Y., at 19.7 cents per cubic yard, has been accepted by the chief of engineers, U. S. Army.

"After the contract for the work has been prepared you will be notified to call at this office to sign it.

"The regulations require that any instrument executed by an incorporated company shall be under its corporate seal, and evidence should be furnished, also under the corporate seal, as to the official character of the person by whom it is executed, and that he is duly authorized to execute the same on behalf of the corporation.

"Please furnish this office with the names and addresses of your proposed sureties, each to justify in the sum of $45,000.

"A memorandum is inclosed containing instructions for the preparation of contractors' bonds. The execution of the necessary bond, however, will be deferred until the articles of agreement have been completed in every respect.

"Very respectfully, G. L. GILLESPIE,
"*Lt. Col. of Engineers.*

"(1 inclo.)"

On the twenty-third of September, 1892, the Secretary of War called upon the chief of engineers for the papers relating to this matter, and they were accordingly submitted to him on that day, and on the following day, with the concurrence of the Secretary of War, the chief of engineers sent to said Gillespie the following telegram:

"WASHINGTON, D. C., *Sept.* 24, 1892.

"To Col. G. L. Gillespie, engineers, Army building, Whitehall St., New York, N. Y.:

"Do not proceed further with closing a contract with the International Dredging Company for Gowanus work until further instructions. Acknowledge receipt of this.

"TURTLE, *Engineers.*"

On the seventh of October, 1892, the following communication was mailed to the relator:

"OCTOBER 7, 1892.

"GENTLEMEN: The matter of the contract for dredging in Gowanus bay is not yet settled, and the action of the department

5 upon the bids received has not yet been determined upon.

It is respectfully suggested that if you desire to be heard upon the subject an opportunity is offered. Any representation you desire to make, either by writing or orally, by attorney or by any officer of your company, will be respectfully received and considered. It is hoped that you will be able to do this by Tuesday—certainly not later than Wednesday—of next week.

"Very respectfully, L. A. GRANT,
"*Acting Secretary of War.*

"The International Dredging Company, Post bldg., 12 to 28 Exchange place, New York city."

VI.

Prior to the sixth day of August, 1892, there had been adopted and was in use by said corps of engineers, under the authority of the Secretary of the Department of War, a form of contract to be used by officers of said corps of engineers in the preparation of formal articles of agreement between the Government of the United States and persons who had contracted to do work on river and harbor improvements and other work under the supervision of said corps of engineers, said blank form of contract being the one referred to in paragraph No. 25 of the specifications forming part of "Exhibit A" hereto. Before the relator filed its said proposal it had received from said Gillespie one of said printed forms of contract, and it filed its said proposal in reference thereto, and said Gillespie also referred thereto in his said letter of September 22, 1892. A copy of said form of contract is hereto appended, marked "Exhibit D," and made part hereof.

VII.

On or about the twenty-sixth day of September, 1892, the relator notified said Gillespie that it was ready to give bond and enter into articles of agreement, in accordance with his said communication of September 22, 1892, and furnished him the names of his proposed sureties, each to justify in the sum of $45,000, and the relator ever since has been ready, able, and willing to enter into such articles of agreement with the Government of the United States, in accordance with the terms of its said proposal, and to give sureties as required by said specifications, and in all respects to comply with its obligations arising out of its said proposal and the exceptance thereof as aforesaid, and after September 26, 1892, the relator from time to time down to and including the twenty-first day of December, 1892, demanded of said Secretary of the Department of War that he should execute or cause to be executed and delivered to the relator a contract conforming to its said accepted proposal.

VIII.

The chief of said corps of engineers at all times after said proposal was accepted as aforesaid recognized the relator's rights, as here-

6 inabove set forth, as appears by a communication from said chief of engineers, dated October 4, 1892, to L. A. Grant, acting Secretary of War, which is in the words and figures following:

"*Subject: Dredging in Gowanus Bay.*

"Office of the chief of engineers, United States Army

"WASHINGTON, D. C., *October* 4, 1892.

"Hon. L. A. Grant, acting Secretary of War.

"SIR: Referring to our conversation of this morning with reference to the cumulation of two or more works in one proposal and contract, I have the honor to invite your attention to the fact that prior to September 19, 1890, the Secretary of War, under the operation of section 3717, Revised Statutes, was required to issue separate proposals and make separate contracts for separate works, but by section 2 of act of September 19, 1890, vol. 26, p. 452, Statutes, authority was given to cumulate two or more works of river and harbor improvement in the same proposal and contract. This is in the interest of economy, and under this provision Lieutenant Colonel Gillespie issued requests for proposals for three works located in New York harbor. It was well understood that the bidders were bidding on all the work, and that a contract would be made for all the work or none, and in this competition the International Contracting Company was the lowest bidder. The local officer, Lieutenant Colonel Gillespie, recommended to the chief of engineers the acceptance of the bid of the company, which recommendation was approved on the 19th ultimo, and the International Contracting Company was, on the 22d of September, advised that their bid was accepted. After careful inquiry it appears that the sureties of this company are entirely acceptable, and that when they made their bid they were an incorporated company under the laws of the State of New Jersey.

"In view of all the facts, no other course than to perfect the contract with the International Contracting Company seems to me possible.

"Very respectfully, your obedient servant,

"THOS. LINCOLN CASEY,

"*Brig. Gen., Chief of Engineers.*"

But said Secretary of the Department of War, after hearing the relator and overruling its plea and claim that he had neither power nor jurisdiction to recall or reconsider said acceptance of the relator's said proposal, refused to either execute or cause to be executed formal articles of agreement between the relator and said Government for the doing of said work in Gowanus bay, and, on the contrary, instructed the chief of said corps of engineers not to enter into any such articles of agreement or to recognize in any way the rights of this relator under its said proposal and the acceptance thereof as aforesaid, giving as his reasons for this action:

7 First. That said acceptance of the bid of the relator was not properly made and was not binding on the Government.

Second. That said bid and the bid of the W. H. Beard Dredging Company, hereafter mentioned (which was the next lowest bid), were irregular and improper, and that neither should be accepted; and

Third. That all said bids should be rejected and the work should be readvertised.

And, against the wishes and protest of the relator, said Secretary of the Department of War caused to be published a new advertisement for said work in Gowanus bay, based upon and referring to new specifications, which differed from the specifications included in Exhibit "A" hereto only in that paragraph 36 (referring to the "eight-hour law") was omitted, and in that the time for commencing the work was April 5, 1892, and the time for completing it was August 1, 1894, and also in that there was added to the specifications the following paragraph:

"Bidders may make proposals for one or more of the channels, naming a separate price per cubic yard for each, with a view of obtaining a contract for the channels so bid upon, independently of the award of contracts for other channels; or they may independently or in addition name separate prices for two or more channels, with the view of obtaining contracts for all of the channels for which proposals are so made by them."

Said new advertisement was in the words and figures following:

"U. S. ENGINEER OFFICE,
"ARMY BUILDING, NEW YORK, *October* 26, 1892.

"Sealed proposals for dredging the channels in Gowanus bay, N. Y., will be received at this office until 12 m. December 21, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office.

"G. L. GILLESPIE,
"*Lieut. Col. of Engineers.*"

IX.

On the twenty-first day of December, 1892, and before the hour of twelve o'clock m. on that day, the relator delivered to said Gillespie at his office, in the city of New York, another sealed proposal for doing said work, said proposal being made in response to said advertisement of October 26, 1892, and conforming in all respects to the specifications and blank forms referred to in said advertisement, copies of which had been furnished to the relator by said Gillespie after the twenty-sixth day of October, 1892, and prior to the twenty-first day of December, 1892. At the same time that said last-mentioned proposal was delivered by the relator to said Gillespie, as aforesaid, the relator also delivered to him a written communication, signed by it and addressed to him in his official capacity, by which the relator notified him that it did not waive, in whole or in part, the rights vested in it by reason of its former proposal

8 of September 14th, 1892, and the acceptance thereof by the War Department, and that it made its said proposal of December 21, 1892, to diminish its loss and damage by reason of the unlawful rejection of its former proposal and because its plant for the work was already well under construction under the former award; and in and by said communication said relator further notified said Gillespie that it had begun and intended to prosecute a suit in the supreme court of the District of Columbia to assert its rights in the premises, and notified said Gillespie that it would claim as part of its loss and damages, by reason of the unlawful acts of the Government and its officers, the difference between the amount of its bid under the advertisement of October 26, 1892, and the amount of the bid awarded it under the bid of August 6, 1892. A copy of said communication of December 21, 1892, is hereto appended, marked "Exhibit E," and made part hereof.

By its accepted proposal of September 14, 1892, the relator was entitled to receive as compensation the sum of nineteen and seven-tenths cents per cubic yard, scow measurement, for each cubic yard of material to be removed under the contract. By its proposal of December 21, 1892, the relator offered to do said work for the sum of thirteen and seven-tenths cents per cubic yard, scow measurement. The amount of work covered by each of said proposals was about nine hundred thousand cubic yards.

At said letting of December 21, 1892, the relator was again the lowest bidder, and the contract was awarded to it under that proposal. A formal contract in pursuance of the relator's proposal of December 21, 1892, and the acceptance thereof by and on behalf of the Department of War was entered into by the relator and the Department of War on the 6th day of January, 1893, said contract being executed on behalf of the Department of War by said Gillespie and by said G. L. Gillespie and said Thomas L. Casey in their respective official capacities aforesaid, and immediately thereafter the relator entered upon the performance of the work and is now engaged therein, and has completed about one-third thereof.

X.

For about ten years prior to September, 1892, there existed among nearly all the principal corporations and persons owning and controlling dredging plants along the Atlantic coast of the United States a combination, having for its object the prevention of competition in the letting of contracts by the Government of the United States for dredging in the several harbors along said coast and the keeping up at the same time of the appearance of competition, so as to deceive the officers and agents of the Government having in charge such work. Said combination was not perfected so as to enable it to control said work until about the year 1886, by which time, however, it had either absorbed or forced out of business all dredging companies along the Atlantic coast, and from that time until 1887 it held a monopoly of said work in the harbors of Boston, New York, Philadelphia, Baltimore, Washington, Norfolk, Charleston,

9 Savannah, and all other harbors along the Atlantic coast of the United States. During that period, by reason of its exclusive control of said work, it obtained from the Government of the United States and divided among its members many hundreds of thousands of dollars more than the Government would have been required to pay if there had been any real competition for the work. It was the custom of said combination to allot the work in the several harbors so controlled by it among the several members thereof at the pleasure of the officers or agents of the combination, who had a central office in the city of New York. Whenever proposals were invited for any such work several members of the combination would submit proposals previously agreed upon by the members thereof or its managing officers at said central office, taking care that the member of the combination to whom the work had been so allotted should file the lowest bid, except that in some instances, where it was feared that bids might be submitted by outside parties, a low proposal would be submitted on behalf of the combination in the name of some irresponsible person, who would submit with such proposal a bond, the sureties upon which would also be irresponsible. The object of this proceeding was that if any bid at a price lower than that fixed by the combination should be presented the work would be awarded to such irresponsible bidder, in whose name some member of the combination would do the work, whereas if no such outside bid should be filed and the work should thereupon be awarded to such irresponsible bidder, he would make default, and usually the work would then be turned over to the next highest bidder, who would be the member of the combination to whom the work had previously been so allotted.

The relator, The International Contracting Company, was organized in April, 1892. Prior to that time the persons who organized said International Contracting Company had been contesting with said combination its control of the work of dredging along the Atlantic coast, and after said company was organized it succeeded in obtaining some of the contracts for said work. Said persons before said company was organized and said company afterwards and prior to September 14, 1892, were repeatedly solicited to join said combination and declined to do so, believing its practices to be illegal and dishonest.

The unsuccessful bidders at the letting of September 14, 1892, hereinabove referred to, were P. Sanford Ross and three corporations, called respectively the Atlantic Dredging Company, the Morris and Cummings Dredging Company, and the W. H. Beard Dredging Company. All said unsuccessful bidders were and for a long time had been members of said combination. The president of said W. H. Beard Dredging Company was one W. H. Beard, who was and for several years prior thereto had been one of the controlling spirits of said combination. After the relator's said proposal of September 14, 1892, had been accepted as aforesaid said W. H. Beard, on behalf of said combination and as its agent, pretend-

ing to act in the interest of the said W. H. Beard Dredging
10 Company as the next lowest bidder at said letting, applied to the Secretary of the Department of War for the time being to have the acceptance of the relator's said proposal withdrawn and vacated, upon the alleged ground that the relator's said proposal of September 14, 1892, was defective, in that in and by said proposal the relator offered to commence said work within ninety days after the awarding of the contract and to complete the entire work on or before June 1, 1894, whereas the specifications for said work, which had as aforesaid been submitted to bidders and to which said proposal of the relator referred, provided that the work should be commenced on or before October 1, 1892, and completed on or before December 1, 1893; and the relator avers that it was, in consequence of this application on the part of the said W. H. Beard, made ostensibly on behalf of the W. H. Beard Dredging Company, but really on behalf of said combination, for the purpose of crushing your relator, as other bidders had been crushed, by the efforts of said combination and the members thereof; that the Secretary of the Department of War did, as aforesaid, refuse and decline to execute or cause to be executed a contract with the relator under its said proposal of September 14, 1892, and the acceptance thereof, as aforesaid, and did, as aforesaid, cause said work to be relet on the 21st day of December, 1892.

After receiving said Gillespie's letter of September 22, 1892, addressed to the relator's president and informing him that the relator's proposal of September 14, 1892, had been accepted and notifying him that after the contract for the work should be prepared he would be invited to call at said Gillespie's office to sign it, the relator at once directed certain contractors with whom, before September 14, 1892, it had arranged to build for it a plant for doing said work in case its proposal should be accepted, to proceed with their contract; and thereupon the building of said plant was at once begun by said contractors, and the relator became bound to take said plant when finished and to pay for it, and in this way and at that time, and before the relator or any of its officers, agents, or attorneys knew or had reason to believe that any attempt would be made to deprive it of the benefits and rights accruing to it under its said accepted proposal, the relator had assumed liabilities amounting to nearly two hundred thousand dollars; and notwithstanding the efforts that were being made prior to December 21, 1892, to have said work relet, and notwithstanding the publication of said advertisement of October 26, 1892, the relator was advised and believed that it was entitled to do said work under its said accepted proposal, and that either by the voluntary action of the Secretary of the Department of War for the time being or through the action of the courts upon the application of the relator said work would finally be awarded to it, and it therefore continued its preparations for the doing of said work down to and including the 20th day of December, 1892; but then finding that its rights in the premises would be disregarded and that said work would be relet, to save itself from great and irreparable loss if said work should be

11 relet to some other contractor, leaving the relator bound to take and pay for said plant, it took the action hereinbefore set forth in reference to filing a second proposal for said work, accompanied, as aforesaid, by the paper of which Exhibit E hereto is a copy, reciting and reserving all its rights in the premises.

XI.

On the sixth day of August, 1892, and thence continuously till the present time there were in full force and effect certain regulations for the Army of the United States which theretofore had been duly adopted and published by the Secretary of the Department of War by authority of law. A copy of such parts of said regulations as the relator is advised are material in this connection is hereto appended, marked "Exhibit H," and made part hereof.

XII.

During the entire period referred to in the next preceding paragraph there were also in full force and effect certain rules and regulations which theretofore had been approved and published by the Secretary of the Department of War by authority of law for the instruction and government of the corps of engineers of the Army of the United States. Such of said rules and regulations as the relator is advised are material in this behalf are in the words and figures following:

"2. The chief of engineers shall have his headquarters at the seat of government, and shall be charged, under the direction of the Secretary of War, with the command of the engineer department, including its bureau, and with the regulation of the duties of the officers and troops of the corps of engineers, as well as of all agents and others who may be employed under his direction within the limits of his department. By virtue of this authority he directs the affairs of the department and gives such orders to the officers and soldiers and to all individuals connected therewith as the necessities of the service demand.

* * * * * * *

"68. When bids are opened and it is contemplated to enter into formal written contracts with bonds, the abstracts of the bids will be forwarded to the office of the chief of engineers, with recommendation for action in regard to accepting or rejecting the bid or bids received, and no such bid will be accepted or rejected by the officer in charge of work in advance of approval by the chief of engineers.

"69. When abstracts of bids are forwarded to the office of the chief of engineers, note will be made thereon of the balance of the appropriations for the work available for payments under the contract about to be entered into, and to obtain this balance all outstanding liabilities and amounts covered by existing contracts should be deducted from the unexpended appropriations for the work, in so far as their expenditure has been authorized by approved projects. The abstracts will also show the totals of the respective bids.

"70. All contracts and papers connected with the same, made
12 by officers of the corps or agents in charge of works, will be made in accordance with the printed forms prescribed by the Secretary of War, and these forms and other printed forms allowed will be furnished from the bureau when required.

"71. Extensions of contracts are not in any case to be made until the approval of the chief of engineers has been obtained."

XIII.

The relator is advised and avers that all the official acts and transactions set forth in paragraphs III to VIII, both inclusive, of this petition were done and conducted in accordance with law and with the regulations prescribed, as aforesaid, for the government of the Army of the United States, and also with the rules and regulations prescribed, as aforesaid, for the instruction and government of said corps of engineers.

XIV.

The relator is advised and avers that by the acceptance of its proposal, as aforesaid, there was imposed upon it the obligation of entering into articles of agreement with the Government of the United States in accordance with the provisions of the specifications and blank form of articles of agreement hereinabove referred to and made part hereof, and also the obligation of giving bond to the United States, with good and sufficient sureties, for the faithful and proper fulfillment by it of such articles of agreement, and that thereupon and thereby it became and was the duty of said Stephen B. Elkins, as Secretary of the Department of War, to execute or cause to be excuted and to be delivered to the relator articles of agreement upon the form of which "Exhibit D" hereto is a copy in accordance with the specifications and the accepted proposal aforesaid.

XV.

Said Stephen B. Elkins continued to hold the office of Secretary of the Department of War until the 4th day of March, 1893, on which day he was succeeded in that office by the respondent, Daniel S. Lamont. At that time the suit instituted as aforesaid by the relator against the said Stephen B. Elkins, as Secretary of the Department of War, was pending in the Supreme Court of the United States, and by reason of the vacation of his said office by said Stephen B. Elkins said suit thereupon abated, as will more fully appear from an order in said cause made by said Supreme Court of the United States on the 23rd day of October, 1893, a copy of which order, marked "Exhibit F," is hereto appended. On the fourth day of November, 1893, the relator, by his attorneys, requested the respondent, Daniel S. Lamont, to execute and deliver to the relator a contract conforming to the proposal which was accepted as aforesaid on the 22d day of September, 1892; but the respondent, by a letter dated November 14, 1893, addressed to the relator's said attorneys refused to comply with its request. A copy of said letter is hereto

appended, marked "Exhibit G," and made part hereof. And
13 so, notwithstanding the rights vested in the relator by the facts hereinabove set forth, it is unable to enforce the same and is without any remedy at law or in equity save that which it now seeks in this honorable court.

Therefore the relator, The International Contracting Company, prays that the writ of mandamus may issue, addressed to said Daniel S. Lamont, Secretary of the Department of War, commanding him in his said official capacity to execute or cause to be executed articles of agreement in the form of which "Exhibit D" hereto is a copy and in accordance with the relator's said proposal of September 14, 1893, and the said acceptance thereof, and to permit the relator also to execute such articles of agreement and thereupon to deliver the same to the relator.

THE INTERNATIONAL CONTRACTING COMPANY,
By A. AMES HOWLETT, *President.*

A. S. WORTHINGTON,
DUDLEY & MICHENER,
Att'ys for Relator.

I, A. Ames Howlett, on oath say that I am the president of the International Contracting Company, whose name is signed to the foregoing petition by me; that I have been duly authorized to file said petition by the board of directors of said company, and that the statements made in said petition are true to the best of my knowledge and belief.

(Signed) A. AMES HOWLETT.

Subscribed and sworn to before me, a notary public in and for the city and county of New York, in the State of New York, this 29th day of November, A. D. 1893.

(Signed) ROBERT GIBSON, JR.,
Notary Public No. 14, *New York Co., N. Y.*

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Henry D. Purroy, clerk of the city and county of New
[SEAL.] York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Robert Gibson, Jr., before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 29th day of November, 1893.

(Signed) HENRY D. PURROY, *Clerk.*

14 "EXHIBIT A."

Dredging the Channel in Gowanus Bay, New York.

Advertisement.

U. S. engineer office, Army building, 39 Whitehall street.

NEW YORK, N. Y., *August* 6, 1892.

Sealed proposals for dredging the channels in Gowanus bay, New York, will be received at this office until 12 m., September 14, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office.

Specifications.

General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guarantee in manner and form as directed in these instructions.

5. All bids and guarantees must be made in triplicate, upon printed forms to be obtained at this office.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a judge of United States court, United States district attorney, collector of customs, or any other officer under the United States Government.

7. A firm will not be accepted as surety, nor will a partner be accepted as surety for a copartner or for a firm of which he is a member. An officer of a corporation will not be accepted as surety for such corporation. Sureties must be citizens of the United States.

8. Each signature in proposals, guarantees, contracts, and bonds shall have affixed to them seals of wax, wafer, or other adhesive substance, and should be written out in full, and the signatures to the guarantees, contracts, and bonds should be attested by at least one witness, and when practicable by a separate witness to each signature.

15 9. Each guarantor will justify in the sum of thirty thousand (30,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guarantee attached to the bid.

10. When firms bid, the individual names of members should be written out, and should be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

11. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

16. Any one signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposals, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guarantees must be placed in a sealed envelope marked "Proposals for improving Gowanus bay, N. Y.," and inclosed in another sealed envelope addressed to "Lt. Col. G. L. Gillespie, corps of engineers, U. S. A.," at this office. The outer envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

23. The United States reserves the right to reject any and all

bids, and to waive any informality in the bids received; also
16 to disregard the bid of any failing bidder or contractor known as such to the engineer department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount equal to twenty-five per cent. of the money value of the contract, within ten (10) days after being notified of the acceptance of his proposal.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office, and will be furnished if desired to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General Conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

29. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

30. Transfers of contracts, or of interests in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

32. The decision of the engineer officer in charge as to quality and quantity shall be final.

33. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimates of quantities for themselves.

34. Payments will be made monthly. A percentage of ten (10) per centum will be retained from each payment until the completion of the contract.

35. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from the payments due or to become due to the contractor; provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, allow the

contractor additional time in writing, as provided for in the
17 form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the engineer department of the army.

36. The attention of bidders is invited to the following provisions contained in act of Congress approved August 1, 1892:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer or the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

Description of Work.

Locality.—The locality of the proposed work is in Gowanus bay and creek, New York harbor, from the entrance to Erie basin to the foot of Percival street; and in Bay Ridge channel, from opposite Twenty-eighth street to opposite Sixtieth street. The mean range of the tide is 4.4 feet.

Dredging.—The channels will be dredged to a depth of 21 feet at mean low water, between lines to be laid out by the engineer in charge; the depth varies from 21 feet to 6 feet, and the cutting will average 10 feet.

Material.—So far as known the material consists of sand and mud.

Quantity.—The number of cubic yards to be removed will depend upon the contract price. The amounts available are:

18	For Bay Ridge channel.....	$88,000
	For Red Hook channel (from entrance to Erie basin to Henry street).....	52,000
	For Gowanus Creek channel (from Henry street to Percival street).....	38,000

Dumping.—The dredged material will be disposed of by the contractor in accordance with the requirements of the supervisor of the harbor of New York.

Inspection.—The work will be done under the immediate supervision of inspectors, appointed by the engineer in charge, who will remain constantly with the plant while it is working, and to whom the contractor will afford reasonable and proper facilities for inspecting the channel and measuring the excavations. All buoys, stakes, gauges, etc., that may be required will be provided by the contractor.

Direction.—The work will be carried on under the direction of the engineer in charge. The orders of the local inspector referring to the manner of conducting the improvement will be strictly obeyed. Material excavated beyond the lines designated, or from below the contract depth in excess of an average of one foot over the area dredged will not be paid for. No work will be done on Sunday, nor on legal holidays, except by special authority from the engineer in charge.

Bids.—Bidders will state the price per cubic yard, scow measurement, at which they will agree to dredge and properly dump the material for each channel separately. Bidders must also state the number, character and capacity of the dredge they propose to use.

Progress.—If at the close of any working month the progress of the work shall not have been such as to indicate that the contract will be completed at the time specified, the engineer officer in charge of the work may take such measures as may seem necessary in his judgment to secure its completion by the designated time, and the excess of the cost, if any, of the work so done over that for equivalent amount of work done under the contract shall be deducted from the sum that may be then due the contractor, or that may subsequently become due him under the contract.

Time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work.

Proposal for Improving Gowanus Bay, N. Y.

NEW YORK CITY, N. Y., *Sept. 8th*, 1892.

To Lieut. Col. G. L. Gillespie, corps of engineers, U. S. A., Army building, 39 Whitehall St., N. Y. city.

SIR: In accordance with your advertisement of August 6, 1892, inviting proposals for improving Gowanus bay, N. Y., and subject

19 to all the conditions and requirements thereof, and of your specifications, dated August 6, 1892, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we propose to do the dredging required, at the following prices, viz:

	$ Cts.
From Bay Ridge channel (from opposite 28th street to opposite 60th street), at the rate of nineteen $\frac{7}{10}$ cents per cubic yard, scow measurement.....	19.7
From Red Hook channel (from entrance to Erie basin to Henry street), at the rate of nineteen $\frac{7}{10}$ cents per cubic yard, scow measurement.....	19.7
From Gowanus Creek channel (from Henry street to Percival street), at the rate of nineteen $\frac{7}{10}$ cents per cubic yard, scow measurement.....	19.7

The plant proposed to be used is as follows:

Two combination dredges each of a capacity of four thousand (4,000) cubic yards per day with sufficient scows for the output; one of the said dredges with its scows to commence operations within 90 days of the awarding of the contract and the other dredge to commence operations 9 months thereafter, and the entire work to be completed on or before June 1st, 1894. In the event of an epidemic prevailing in this locality we reserve the privilege of ceasing the work until prudent to resume.

We make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

(Signature:) THE INTERNATIONAL CONTRACTING COMPANY,
By JOSEPH EDWARDS, *President*, [SEAL.]
(Address:) 16 *Exchange Place, New York City, N. Y.*
[SEAL OF CO.]

Attest: A. AMES HOWLETT,
Vice-president.

Guarantee.

We, Alfred A. Howlett of Syracuse, in the State of New York, and H. A. V. Post of New York, in the State of New York, hereby guarantee and bind ourselves and each of us, our and each of our heirs, executors, and administrators, to the effect that if the bid of the International Contracting Co., herewith accompanying, dated September 8th, 1892, for improving Gowanus bay, N. Y., shall be accepted in whole or in part within sixty (60) days from the date of the opening of proposals, the said bidder, the International Contracting Co., will, within ten days after being notified of such acceptance, enter into a contract with the United States in accordance with the terms and conditions of the advertisement, and will give bond with good and sufficient sureties for the faithful and proper

fulfillment of the same. And in case the said bidder shall
20 fail to enter into contract within the said ten days with the proper officer of the United States, and furnish good and sufficient bond for the faithful performance of the same according to the terms of said bid and advertisement, we and each of us hereby stipulate and guarantee, and bind ourselves and each of us, our and each of our heirs, executors and administrators, to pay unto the United States the difference in money between the amount of the bid of the said bidder and the amount for which the proper officer of the United States may contract with another party to improve said bay, if the latter amount be in excess of the former, for the whole period covered by the proposal.

ALFRED A. HOWLETT. [SEAL.]
H. A. V. POST. [SEAL.]

Witnesses:
ALBERT A. HALL.
A. AMES HOWLETT.

Dated September 8th, 1892.

(Executed in triplicate.)

Justification of the Guarantors.

STATE OF NEW YORK, }
County of New York, } ss:

I, Alfred A. Howlett, one of the guarantors named in the within guarantee, do swear that I am pecuniarily worth the sum of thirty thousand (30,000) dollars, over and above all my debts and liabilities.

(Signature of guarantor:)
ALFRED A. HOWLETT. [SEAL.]

Sworn to before me September 8th, 1892.

(Signature of officer administering oath, with seal, if any:)
J. W. WEST,
[SEAL.] *Notary Public, Richmond Co.*

Certificate filed in New York Co.

STATE OF NEW YORK, }
County of New York, } ss:

I, H. A. V. Post, one of the guarantors named in the within guarantee, do swear that I am pecuniarily worth the sum of thirty thousand (30,000) dollars, over and above all my debts and liabilities.

(Signature of guarantor:) H. A. V. POST. [SEAL.]

Sworn to before me September 12th, 1892.

(Signature of officer administering oath, with seal, if any:)
J. D. REYNOLDS,
[SEAL.] *Notary Public, Kings Co.*

With certificate in New York Co.

21 *Certificate.*

I, Francis Hendricks, collector of the port of New York, do hereby certify that Alfred A. Howlett and H. A. V. Post, the guarantors above named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

F. H.

(Signature of certifying official:)

FRANCIS HENDRICKS, *Collector.* [SEAL.]

NOTE.—The certificate may be given separately as to each guarantor, and modified accordingly.

"EXHIBIT B."

(Copy.)

Engineer office, U. S. Army, room 62, Army building, 39 Whitehall St.

NEW YORK, N. Y., *September* 16, 1892.

Brig. Gen. Thomas L. Casey, chief of engineers, U. S. A., Washington, D. C.

GENERAL: I have the honor to enclose an abstract of proposals, and one copy of each proposal received and opened by me, September 14, 1892, for improving channels on Gowanus bay, N. Y.

The bid of the International Contracting Co., to do the work at $19\frac{7}{10}$ cents per cubic yard, is regarded as reasonable and just, and I respectfully recommend that it be accepted.

Very respectfully, your obedient servant,

(Signed) G. L. GILLESPIE,
Lt. Col. of Engineers.

(6 enclosures.)

(1st indorsement.)

OFFICE OF CHIEF OF ENGINEERS, U. S. ARMY,
Sept. 19th, 1892.

Respectfully returned to Lt. Col. Gillespie, corps of engineers, approved. When such record as may be necessary has been made, this paper will be returned to this office.

(Signed) H. M. ADAMS,
Major Corps of Engineers, in Charge.

"EXHIBIT C."

WAR DEPARTMENT,
WASHINGTON CITY, *January* 18, 1886.

Orders.

During the authorized absence of the chief of any bureaus of the War Department, the senior officer of the department or corps,

22 whose chief is absent, on duty in said bureau, is, by direction of the President, under section 1132 of the Revised Statutes, empowered to take charge thereof and perform the duties of the chief of the department or corps, as the case may be, during such absence, but will not change or modify existing rules or regulations governing the business of said bureau, nor give orders or instructions tending to establish new rules, without first, in each case, obtaining the approved of the Secretary of War.

Each chief of a bureau will report to the Secretary of War, when he has authority to be absent, the name of the officer who will take charge of his office under this order.

The order of July 31, 1885, upon this subject is hereby revoked.

WILLIAM C. ENDICOTT,
Secretary of War.

Official copy:
JOHN TWEEDALE,
Chief Clerk.

"EXHIBIT D."

(Form 19.)

Articles of agreement entered into this — day of ——, eighteen hundred and ninety—(189–,) between —— ——, corps of engineers, U. S. Army, of the first part, and —— —— and —— ——, partners, doing business under the firm name of —— —— of —— of the county of ——, State of —— of the second part:

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said —— —— for and in behalf of the United States of America, and the said —— —— for — heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

. . . . . .
. . . . . .
. . . . . .

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as — not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said —— —— shall commence —— on or before the — day of ——, eighteen hundred and ninety—(189–,) and shall complete the —— on or before the — day of ——, eighteen hundred and ninety— (189–.)

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment

23 of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers.

24 The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said —— —— when the —— contracted for shall have been delivered and accepted, reserving — per cent. from each payment until the whole —— shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said —— —— to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said —— —— are reserved to the United States.

NOTE.—The copy of contract for the bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished.—See also A. R. 655.

NOTE.—See circular No. 18, O. C. of E., Oct. 18, 1887. See also circular No. 10, O. C. of E., Aug. 3, 1889.

No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.*

This contract shall be subject to approval of the chief of engineers, U. S. A.

In witness whereof, the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Witnesses:

—— ——.
—— ——.
—— ——.
—— ——.

* NOTE.—Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to members of or delegates to Congress, is not to be construed to extend to this contract."—See sec. 3740, Revised Statutes.

25 (Executed in quintuplicate.)

Approved ——, 189–.

——,
Brig. Gen., Chief of Engineers.

* I do solemnly swear that the foregoing is an exact copy of a contract made by me personally with —— ——; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said —— —— or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

——
—— *Corps of Engineers.*

Subscribed and sworn to before me this — day of ——.

——,
——.

EXHIBIT E.

NEW YORK, *Dec. 21st*, 1892.

Lieut. Col. G. L. Gillespie, corps of engineers, U. S. A., engineer officer, U. S. A., # 29 Whitehall St., N. Y.

DEAR SIR: Referring to this company's proposal under the advertisement of Oct. 27th, 1892, the International Contracting Company does not waive, in whole or in part, the rights vested in it by reason of the proposal for the same work submitted to you by the company on the 14th day of September, 1892, and which proposal was accepted by you on behalf of the War Department by your written communication to the company on Sept. 22nd, 1892, and makes the present proposal to diminish its loss and damage by reason of the unlawful action of the Government next referred to and because its plant for the work is already under construction under such award.

This company insists upon its rights under such original proposal and acceptance and claims that the Secretary of War is required by law to enter into formal articles of agreement with it in accordance with the terms of such proposal and the acceptance thereof.

For fuller information there is submitted herewith a printed copy of a petition, with the exhibits thereto, which was filed by the International Contracting Company in the supreme court of the District of Columbia on the 6th day of December, 1892, and which is now pending in the said court sitting in general term, wherein the claim of said company as to the effect of its former proposal and acceptance thereof by the War Department are fully set forth in said petition and accompanying papers.

It is the intention *to* the company to push said suit to a final

* NOTE.—This affidavit is required only on the quintuplicate copy of contract intended for the returns office, Department of the Interior.—A. R. 669.

26 hearing in the court of last resort, and the company notifies you that it will claim as part of its losses and damages by reason of the unlawful acts of the Government and its officers the difference between the amount of its bid under the invitation of October 27th, 1892, and the amount of the awarded bid under the invitation of August 6th, 1892.

Yours respectfully,

(Signed) THE INTERNATIONAL CONTRACTING CO.
JOSEPH EDWARDS, *President.*

EXHIBIT F.

Supreme Court of the United States, October Term, 1893.

THE UNITED STATES *ex Rel.* THE INTERNATIONAL CONTRACTING COMPANY, Plaintiff in error,
vs.
STEPHEN B. ELKINS, Secretary of the Department of War. } No. 878.

In error to the supreme court of the District of Columbia.

This cause having been called to the attention of the court by Mr. Solicitor General Maxwell and a suggestion by counsel for the plaintiff in error that the cause has abated having been filed, therefore, in pursuance of said suggestion, it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby, dismissed with costs.

Per Mr. Chief Justice FULLER.

October 23, 1893.

EXHIBIT G.

File No., 1280 A.

WAR DEPARTMENT,
WASHINGTON, D. C., *November* 14, 1893.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of November 4, 1893, in which, on behalf of the International Contracting Company, you request me, "as the Secretary of the Department of War for the time being, to execute and deliver to that company a contract conforming in all respects to the proposal filed by said company with Lieutenant Colonel Gillespie on the 19th day of September, 1892, and the acceptance thereof by the Secretary of War through the acting chief of engineers."

Your request is respectfully declined for the same reasons that my predecessor declined to enter into such a contract, and the additional reason that the International Contracting Company are now under contract to do the work for about $\frac{2}{3}$ the amount named in said proposal. I see no justification for entering into another contract with them or for paying them $100,000 more than their contract calls for.

Very respectfully yours,

(Signed) DANIEL S. LAMONT,
Secretary of War.

Messrs. A. S. Worthington, Sullivan & Cromwell, and Dudley & Michener, attorneys for the International Contracting Company, rooms 143 to 146, Washington Loan and Trust Co. b'ld'g.

27 "EXHIBIT H."

WAR DEPARTMENT, *February* 9, 1889.

The President of the United States directs that the following regulations for the army be published for the government of all concerned, and that they be strictly observed. Nothing contrary to the tenor of these regulations will be enjoined in any part of the forces of the United States by any commander whatsoever.

WM. C. ENDICOTT,
Secretary of War.

ARTICLE IV.

Command.

* * * * * * *

13. The functions assigned to any officer in these regulations by title of office, devolve upon the officer acting in his place, except when otherwise specified.

* * * * * * *

ARTICLE LXII.

Staff Administration.

813. The supply, payment, and recruitment of the army, and the direction of the expenditures of the appropriation for its support, are by law, intrusted to the Secretary of War. He exercises control through the bureaus of the War Department. He determines where and how particular supplies shall be purchased, where they shall be delivered, inspected and stored, and how distributed. (R. S., sections 219, 220, 221, 222, 223, 1133, 1141, 1152, 1164, 1173, 1175, 1186, 1188.)

* * * * * * *

ARTICLE LXXXII.

Corps of Engineers.

(NOTE.—Regulations for the government of the corps of engineers, prepared and published under the authority of the Secretary of War, are distributed to its officers by the chief of engineers. Only such regulations are herein given as are general in their nature or affect other branches of the service.)

1683. The duties of the corps of engineers comprise reconnoitering and surveying for military purposes; the selection of sites and formation of plans and estimates for military defenses; the construction and repair of fortifications and their accessories of every description; the planning and superintending of defensive or offensive works of troops in the field; the examination of routes of communication for supplies and for military movements, and the construction of military roads and bridges; also the execution of

river and harbor improvements assigned to it, and such
28 other duties as the President may order.

It collects, arranges, and preserves all correspondence, reports, memoirs, estimates, plans, drawings, deeds, titles, and models which concern or relate in anywise to the several duties above enumerated.

1684. The chief of engineers shall have his headquarters at the seat of government, and shall be charged, under the direction of the Secretary of War, with the command of the engineer department, including its bureau- and with the regulation of the duties of the officers and troops of the corps of engineers, as well as of all agents and others who may be employed under his direction within the limits of his department. By virtue of this authority, he directs the affairs of his department, and gives such orders to the officers and soldiers, and to all individuals connected therewith, as the necessities of the service demand.

* * * * * * *

ARTICLE LVII.

Contracts and Purchases.

* * * * * * *

Proposals.

622. Information in regard to supplies or services, for which proposals have been invited, will be furnished, on application, to all persons desiring it.

* * * * * * *

624. Bidders for labor will be informed of the nature and extent of the services required, where they are to be performed, and the time allowed for performance. They will be furnished with, or allowed to examine, plans and specifications of all works upon which they desire to bid, and, in general, will be furnished with any information needed to enable them to act understandingly.

* * * * * * *

638. Except in rare cases, when the United States may elect to exercise its right to reject proposals, contracts will be awarded to the lowest responsible *bona fide* bidder, who, when required, produces a proper article, and whose proposal therefor is not unreasonable. In considering bids on similar lists of articles, the advertisements and circulars should, in the absence of a fixed standard for all the articles bid for, be so worded as to permit the award for the most suitable articles offered for the purpose required, and the bids must be considered item by item.

639. Slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid; but the interest of the Government should be fully considered in making the award.

* * * * * * *

29 *Contracts.*

Execution and performance.

651. Formal written contracts under seal, with suitable bonds, will be made in all cases, when time and circumstances permit, except that under the conditions named in paragraph 670 officers whose duty it is to contract for the Government may exercise the discretion therein granted as the interests of the service may dictate.

652. Contracts will be made as nearly as practicable according to prescribed forms, departing therefrom only so far as requisite to meet the necessities of the public service. All conditions will be stated therein as fully and clearly as possible. Contracts shall be made in the name of, and shall be signed by, the chief officer of that branch of the staff of the command to which they pertain.

653. Upon receipt of the contract at the proper bureau of the War Department, it will be examined to see that it complies with the laws, regulations and orders. If found correct, the approval of the proper officer will be endorsed thereon. Should any illegality be discovered it will be submitted to the Secretary of War for his action.

* * * * * * *

Rule to Show Cause. Filed December 4, 1893.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY *vs.* DANIEL S. LAMONT, Secretary of the Department of War. } No. 35208. Law.

Upon motion of the attorneys for the relator and upon consideration of the petition in this case and of the exhibits annexed thereto, it is, this 4th day of December, 1893, ordered that the respondent, Daniel S. Lamont, Secretary of the Department of War, show cause at the opening of the court on the 11th day of December, 1893, why a writ of mandamus should not issue as prayed in said petition:

Provided a copy of this order and of said petition and exhibits be served on said Daniel S. Lamont on or before the 6th day of December, 1893.

W. S. COX, *J.*

Marshal's Return.

Served copies of the within rule to show cause, petition, and exhibits on Daniel S. Lamont, Secretary of the Department of War, Dec'r 6, 1893.

D. M. RANSDELL, *Marshal.*

30 *Order for Entry of Appearance. Filed December* 16, 1893.

In the Supreme Court of the District of Columbia, the 16th Day of December, 1893.

THE UNITED STATES *ex Rel.* THE INTERNATIONAL CONTRACTING CO.
vs.
DANIEL S. LAMONT, Sec'y of War. } At Law. No. 35208.

The clerk of said court will please enter our appearance for the Secretary of War.

ARTHUR A. BIRNEY,
CHAS. H. ARMES,
Attorneys for the Secretary of War.

Demurrer. Filed December 30, 1893.

In the Supreme Court of the District of Columbia.

THE UNITED STATES on the Relation of THE INTERNATIONAL CONTRACTING COMPANY
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } At Law. No. 35208.

Demurrer of the respondent.

The respondent, Daniel S. Lamont, Secretary of the Department of War, says that the petition of the above-named relator, The International Contracting Company, is bad in substance.

A. A. BIRNEY,
Attorneys for Respondent.

1. NOTE.—One of the matters to be argued in support of the above demurrer is that the petition shows that this respondent's predecessor as Secretary of War rejected the bid made under the advertisement for proposals of the 6th day of August, 1892, and, in the exercise of his discretion, lawfully refused to execute the contract pursuant to said bid.

2. Another matter to be argued in support of said demurrer is that the petition also shows that this respondent's predecessor as Secretary of War, after the aforesaid bid was rejected, advertised, under date of October 26, 1892, for further and other proposals for the aforesaid work, and thereafter entered into a contract on behalf of the United States with the relator for the execution of said work pursuant to a bid made by said relator under the said last-mentioned advertisement, said contract being at a much less expense to the United States than the bid first mentioned.

3. Another matter to be argued in support of said demurrer is

that this respondent, in refusing to enter into said contract,
31 as alleged, did so, as the record shows affirmatively, in the exercise of his judgment and discretion.

4. Another matter of law to be argued is that the proposal of the relator was not within or in accordance with the conditions specified by the Government in inviting proposals for the work, but varied therefrom in respect to the time within which the work should be completed and in other particulars, which it was the right and duty of the Secretary of War, in his discretion, to approve or disapprove, ratify or disaffirm.

5. Another matter of law to be argued is that all the acts in the premises of the officers of the corps of engineers were subject to the review and revision of the Secretary of War.

6. Another matter of law to be argued is that the duty of deciding between competitive bidders on the work was not a mere ministerial duty.

7. Another matter to be argued is that it was specified by the Government in inviting proposals for the work that the Secretary of War reserved the right to reject any and all proposals.

Stipulation. Filed December 20, 1893.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY	At Law.
vs.	No. 35208.
DANIEL S. LAMONT, Secretary of War.	

It is hereby stipulated by and between counsel for the respective parties to the above-entitled cause that the rule to show cause heretofore issued herein shall be considered as embracing the facts set forth in the petition and shall be taken as and stand for an alternative writ of mandamus, to which the demurrer herein is filed.

A. S. WORTHINGTON,
Attorney for Relator.
A. A. BIRNEY,
Attorney for Respondent.

Proceedings before the supreme court of the District of Columbia, holding a circuit court (division number two) and special term in and for said District, pursuant to an order made in general term, said special term commencing the first Tuesday, it being the 2nd day, of January, A. D. 1894.

TUESDAY, *January 2nd, A. D.* 1894.

By order of Honorable Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

32 WEDNESDAY, *January 3d, A. D.* 1894.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
vs.
DANIEL S. LAMONT, Secretary of War.
At Law. No. 35208.

Upon hearing the respondent's demurrer to the petition of the relator it is considered that said demurrer be, and the same is hereby, sustained, and it is ordered that the rule on respondent be, and the same is hereby, discharged, and the petition is dismissed at the costs of the relator, and the penalty of the bond for appeal is fixed at two hundred dollars.

Order for Appeal and Citation. Filed January 5, 1894.

In the Supreme Court of the District of Columbia, the 5th Day of January, 1894.

THE UNITED STATES *ex Rel.* INTERNATIONAL CONTRACTING COMPANY
vs.
DANIEL S. LAMONT, Secretary of the Department of War.
At Law. No. 35208.

The clerk of said court will enter an appeal by the relator in this case to the Court of Appeals of the District of Columbia from the order and judgment entered herein on the third day of January, 1894, sustaining the respondent's demurrer and dismissing the petition, and issue citation accordingly.

A. S. WORTHINGTON,
Attorney for Relator.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
vs.
DANIEL S. LAMONT, Secretary of the Department of War.
At Law. No. 35208.

The President of the United States to Daniel S. Lamont, Secretary of the Department of War, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, on the 5th day of February, A. D. 1894, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 5 day of January, 1894, wherein The International Contracting Company

is appellant and you are appellee, to show cause, if any there
33 be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-four.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 6 day of January, 1894.

A. A. BIRNEY,
Attorney for Appellee.

[Endorsed:] No. 35208. Law. The United States *ex rel.* International Contracting Co. *vs.* Daniel S. Lamont, Secretary of War. Citation. Issued January 5th, 1894. Served cop- of the within citation on —— ——. —— ——, marshal. A. S. Worthington, attorney for appellant.

Bond for Appeal. Filed January 10, 1894.

In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* THE INTERNATIONAL CONTRACTING COMPANY *vs.* DANIEL S. LAMONT. } No. —. At Law.

Know all men by these presents that we, The International Contracting Company, as principal, and Charles O. Thompson and Charles E. Kimball, as surety, are held and firmly bound unto the above-named Daniel S. Lamont, Secretary of the Department of War, in the full sum of two hundred dollars, to be paid to the said Daniel S. Lamont, Secretary of the Department of War, his executors or administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of January, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas the above-named The International Contracting Company has prosecuted an appeal to the Court of Appeals of the District of Columbia to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named The International Contracting Company shall prosecute its said appeal to effect and answer all damages and costs

if it shall fail to make good its plea, then this obligation
34 shall be void; otherwise the same shall be and remain in full force and virtue.

THE INTERNATIONAL CONTRACTING COMPANY,
By A. AMES HOWLETT, *Pres't.* [SEAL.]
CHAS. O. THOMPSON, [SEAL.]
252 *West 34th St., New York.*
CHAS. E. KIMBALL, [SEAL.]
45 *Wall St., New York.*

Sealed and delivered in presence of—

EDWARD T. McLAUGHLIN, JR.,
Notary Public, No. 41, New York County, New York.

Approved the 10th day of Jan'y, 1894.

W. S. COX,
Justice S. C., D. C.

O K.
C. H. ARMES.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 47, inclusive, to be a full, true, and correct transcript of the record of all the proceedings had in said court in cause No. 35208, at law, wherein The United States *ex rel.* the International Contracting Company is plaintiff and Daniel S. Lamont, Secretary of War, is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 15th day of January, A. D. 1894.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 284. The United States *ex relatione* the International Contracting Company, appellant, *vs.* Daniel S. Lamont, Secretary of the Department of War. Court of Appeals, District of Columbia. Filed Jan. 16, 1894. Robert Willett, clerk.

35 Court of Appeals of the District of Columbia, February 8, 1894.

THE UNITED STATES *ex Rel.* THE INTERNATIONAL CONTRACTING COMPANY, Appellant,
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } No. 284.

The argument of this cause was commenced by Mr. A. S. Worthington, for the appellant, and continued by Mr. A. A. Birney, for the appellee.

36 Court of Appeals of the District of Columbia, February 9, 1894.

THE UNITED STATES *ex Rel.* THE INTERNATIONAL CONTRACTING COMPANY, Appellant,
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } No. 284.

The argument of this cause was continued by Mr. Louis T. Michener, for the appellant, and concluded by Mr. A. S. Worthington, for the appellant.

37 Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an application by the appellant for a writ of *mandamus* to the Secretary of War of the United States, requiring that official, as the head of the department, to execute or cause to be executed and delivered to the appellant a certain contract, the blank form of which is appended to the petition as part thereof.

It appears that Congress, by the river and harbor appropriation bill of July 13, 1892, made appropriation for the improvement of Gowanus bay channels in the harbor of the city of New York, and the money was required to be expended "under the direction of the Secretary of War and the supervision of the chief of engineers."

Specifications of the work proposed to be done, accompanied with general instructions to bidders and the conditions for letting the work, were duly prepared under the supervision of Col. Gillespie, of the corps of engineers of the United States, at the engineer's office in New York, and sealed bids or proposals were advertised for, to be opened on the 14th of September, 1892, at the engineer's office in New York. By the advertisement, all persons desiring to bid for the work were informed that specifications, blank forms, and all available information would be furnished on application to the office. The general instructions and conditions embraced in the specifications, with reference to which all bids were required to be made, contained some thirty-five articles or clauses. And among these we find the following provisions:

"17. Any conditions, limitations or provisos attached to pro-

posals will be liable to render them informal and cause their rejection."

"23. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the engineer department."

"25. The contract which the bidder and guarantors promise to enter into shall be in its general provisions in the form adopted and in use by the engineer department of the army; blank forms of which can be inspected at this office and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract."

"28. A copy of the advertisement, specifications and instructions will be attached to the contract and form a part of it."

And, in regard to the time within which the work was required to be done, the specifications declared that "work must be commenced on or before October 1, 1892, and be completed on or before December 31, 1893."

The appellant was one of several parties who made proposals; and it proposed to do the dredging of the different channels of the bay at the rate of 19.7 cents per cubic yard, scow measurement. And in the proposal it says: "One of the said dredges with its scows to commence operations within 90 days of the awarding of the contract, and the other dredge to commence operations 9 months thereafter, and the entire work to be completed on or before June 1, 1894." Thus, by this proposed modification of the limitation of time, as prescribed in the specifications, the term for doing the work was extended six months. It was further provided in the proposal, that in the event of an epidemic prevailing in the locality, the appellant reserved the privilege of ceasing the work until prudent to resume. But whose judgment was to determine the question of the prudence as to when the work should be suspended, or when to be resumed, was left entirely indefinite. It was with this proposal to take the work that the appellant offered readiness to execute the blank form of contract appended to the specifications, referred to in the proposal.

The appellant was the lowest bidder for the work; and its proposal was approved and recommended for acceptance by the local engineer at New York, and it was approved and authorized to be accepted by the chief of engineers at Washington, and the appellant was so notified. But the Secretary of War (Elkins) declined to accept or approve the bid, and ordered its rejection. In regard to the action of the Secretary of War, upon the subject-matter then pending, and before any contract had been signed or executed by any of the parties thereto, the appellant in its petition alleges:

"But said Secretary of the Department of War, after hearing the relator, and overruling its plea and claim that he had neither power nor jurisdiction to recall or reconsider said acceptance of the relator's said proposal, refused to either execute or cause to be executed formal articles of agreement between the relator and said

Government for the doing of said work in Gowanus bay, and, on the contrary, instructed the chief of said corps of engineers not to enter into any such articles of agreement, or to recognize in any way the rights of this relator under its said proposal and the acceptance thereof as aforesaid, giving as his reasons for this action: First, that said acceptance of the bid of the relator was not properly made, and was not binding on the Government. Second, that said bid and the bid of the W. H. Beard Dredging Company, thereafter named and referred to, which was the next lowest bid, were irregular and improper, and that neither should be accepted; and, third, that all said bids should be rejected, and the work should be readvertised."

The work was readvertised, as directed by the Secretary of War; and the time for doing the work, under the new advertisement, was for commencement on the 5th of April, 1893, and the completion on August 1, 1894. The time for opening the bids under the new advertisement was December 21, 1892.

38 At the second letting of the work, under the new advertisement, the appellant became a bidder for the work, and was the lowest bidder therefor; the proposal then made was to do the same work proposed to be done in the former proposal, at the rate of 13.7 cents per cubic yard, scow measurement. The amount of work covered by each of the proposals was about nine hundred thousand cubic yards; and the price of the work in the last proposal was less in the aggregate than the first by nearly sixty thousand dollars. This last proposal was duly accepted on the part of the Government, and the contract for the work was duly awarded and formally executed, and the appellant has entered upon the performance of the work, and has already performed a considerable part thereof under the contract based upon the second bid or proposal of the appellant made as just stated.

It is alleged that at the time this last bid or proposal was made the appellant notified the engineer in charge that it did not, by making the second proposal, waive any rights that had accrued to it under the first proposal. But it is not perceived how this can alter the effect of the last bid, and the contract based thereon.

It is also alleged that legal proceedings had been taken against Stephen B. Elkins, the former Secretary of War, to assert the rights of the appellant founded upon the first proposal and alleged acceptance thereof, but that such proceedings abated in the Supreme Court of the United States, upon the retirement of said Elkins from the position of Secretary of War. That thereupon demand was made upon the respondent, the present Secretary of War, for the execution of the contract based upon the first proposal, alleged to have been accepted. But, according to the allegation, the present Secretary wholly rejected the request; and did so for the reason, as he stated, that his predecessor had declined to enter into such contract and for the additional reason that the appellant is "now under contract to do the work for about two-thirds the amount named in its first proposal, and that he saw no justification for entering into another

contract with the appellant, or for paying it $100,000 more than its contract calls for."

The prayer of the petition is that the writ of *mandamus* may issue to the present Secretary of War, commanding him, in his official capacity, to execute or cause to be executed articles of agreement in the form of the blank contract furnished to the appellant from the office of the engineer and filed with its proposal of September 14, 1893, and to permit the appellant also to execute such articles of agreement, and thereupon to deliver the same to the appellant.

The respondent, the present Secretary of War, in obedience to the rule to show cause, appeared and demurred to the petition. And it was thereupon stipulated by the parties that the rule to show cause should be considered as embracing the facts set forth in the petition, and should be taken as and stand for an alternative writ of *mandamus*, to which the demurrer should be considered as filed.

Upon hearing the demurrer, the court below discharged the rule to show cause, and dismissed the petition; from which order this appeal is taken.

Upon this statement of the case three questions arise for consideration:

1. Whether the appellant is not effectually concluded, as to any supposed rights it may have had under its first proposal for the work, by making the second proposal therefor, and entering into the contract upon the basis of such last proposal.

2. Whether, as there was no contract made and executed as required by the statute, the whole subject-matter was not within the judgment and discretion of the Secretary of War, as to the right of having the formal contract executed, and therefore not the subject of *mandamus*.

3. Whether, by the terms and conditions under which the first proposal was made, there was not full reserved right and power in the Secretary of War to disapprove and reject the bid or proposal of the appellant?

1. With respect to the first of these questions, the position of the appellant is certainly anomalous. Upon the rejection by the Secretary of War of the first proposal by the appellant the latter elected to become bidder at a second letting of the work, and at a different price, and has not only entered into the formal contract as required upon the basis of the second bid, but has partly executed the work under that contract; and it now seeks to revert back to its first proposal, and to have that formulated into a regular binding contract upon the United States, and thus have two subsisting contracts for the same work, and calling for compensation at essentially different rates. To justify this there must be shown to exist some peculiar and extraordinary element in the transaction that would take it out of the ordinary course of affairs, and warrant a legal construction of the facts that does not often arise. There is no pretense that there was any mistake that led the appellant into the making of the second bid or proposal and the entering into the contract awarded thereon for doing the work. Nor, is there the slightest ground for contending that there was duress, either legal or moral, which

coerced the appellant into making the second bid, and complying with the terms of the specifications and conditions prescribed to those who desired to contract for doing the work, at prices supposed to be profitable to themselves.

The Government, in rejecting the first proposal and readvertising the work for new proposals, put the appellant to its election, either to stand by its first proposal, and take the chance of maintaining it, or to waive all claim or pretension thereunder, and become a new bidder under the second offer of the work. This election the appellant made. If it did not intend to stand by the second bid or proposal in good faith, it ought to have refrained from bidding altogether at the second offer. A remedy was then open to it, and which would have afforded adequate redress, if the present claim was well founded. For, as said by the Supreme Court, in the case of Board of Liquidation *v.* McComb, 92 U.S., 521, 541, when a plain ministerial duty is threatened to be violated by some positive official act, "any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus*
39 and injunction are somewhat correlative to each other." The court is not asked to displace the contract made on the second bid by the contract to be executed under the first proposal made; but the two contracts are, according to the contention of the appellant, to coexist, and the Government to be held bound upon both, and made to respond for the difference in the price of the work between the two contracts. This cannot be done upon any well recognized principle of law. If the appellant had any valid objection to the provision of the contract that it actually signed, it should have refused to sign it. But, "having made it and executed it, the mouth of the appellant is closed against any denial that it superseded all previous arrangements." Parish *v.* United States, 8 Wall., 489, 490.

2. The second question presented is equally conclusive as the first against the contention of the appellant, though upon broader grounds. The contract initiated under the first proposal by the appellant for the work was never completed, as required by the statute, and therefore was never binding upon the Government. Rev. Stat. United States, sec. 3744, which embodies the act of Congress of June 2, 1862, ch. 93, provides that:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the contract in the returns office of the Department of the Interior as soon after the contract is made as possible, and within thirty days, together with all bids, offers and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers or proposals for the same. All the copies and

papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order according to the number of papers composing the whole return."

All contracts, of the class and character of the one alleged in this case, are required by the section of the statute just recited to be in writing and formally signed by the contracting parties; and in effect this provision of the statute prohibits and renders unlawful any other mode of making such contracts. Clark *v.* United States, 95 U. S., 539; South Boston Iron Co. *v.* United States, 118 U. S., 37, 42. The contract is not complete until reduced to written form and signed by the contracting parties in the manner prescribed by the statute; and it is not within the power of the court, on *mandamus*, to declare that to be a complete and binding contract which the statute declares in effect shall not be so without certain formalities. These formalities are intended for the protection of the Government, and to preclude all contentions as to what shall be regarded as valid contracts to bind the Government. But all the beneficial uses and protection afforded by the statute would be nullified, if the courts were to assume the right or power to compel the agents of the Government to give form and effect to alleged contracts, notwithstanding the mandatory effect of the statute upon the validity of the contract, and the opposition of the Government's agents. In this case, no written agreement, such as that contemplated by the statute, was signed and executed by either of the parties. The local engineer, and the chief of engineers, it is true, both appear to have approved of the proposal of the appellant, and to have accepted the proposals so far as they were competent, and the appellant was notified of the fact. But the ultimate decision of the matter rested with the Secretary of War. Indeed, this application against the Secretary alone concedes his authority to be paramount, and nothing that was done, either by the local engineer in New York, or the engineer-in-chief in Washington, concluded the action of the Secretary of War. It was the duty of the latter to review the whole ground, and if he saw reason, before the formal contract, according to the statute, was completed, for the rejection of the proposal of the appellant, to reject it, and refuse to complete the contract. United States *v.* Adams, 7 Wall., 463. And in doing this he was in the exercise of judgment and discretion that cannot be controlled by the mandate of the courts.

It is certainly the well-settled principle of the decisions of the Supreme Court of the United States, that the writ of *mandamus* may issue where the duty, which the court is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear, and he is without any other adequate remedy. But it is settled doctrine that the writ will not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty, involving the exercise of judgment or discretion. This principle runs through all the cases in the Supreme Court, from Kendall *v.* United States, 12 Pet., 524, and Decatur *v.* Paulding, 14 Pet., 497, to the recent case of Redfield *v.* Windom, 137 U. S., 636, 644.

In the case of United States *v.* Black, 128 U. S., 40, it was said by the Supreme Court, speaking through the late Mr. Justice Bradley: "The court will not interfere by *mandamus* with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a *mandamus* may be issued to compel them."

The cases upon this subject have been recently reviewed and the principle clearly stated, in the case of Noble *v.* The Logging R. Co., 147 U. S., 165, 171.

It would seem to be too clear for question, that to examine and determine the question, whether the proposal of the appellant was sufficient, and conformed to all the specifications and conditions under which it was made for doing the work, did, of necessity, require the exercise of judgment and discretion. It was certainly more than the performance of a mere ministerial duty. Indeed, the very object of investing the Secretary of War with power of directing the making and of approving these contracts was that he should exercise judgment and discretion in the matter for the protection of the Government. And, upon the assumption that there was the exercise of judgment or discretion in the final rejection of the proposal of the appellant, the question, whether the successor of the then Secretary of War would have the power to reverse that final determination of his predecessor, and direct the execution of the contract alleged, might be one of doubtful determination. The question arose and was discussed in some of its bearings in the case of Noble *v.* The Logging R. Co., *supra;* but we are not required to discuss or decide the question here.

It has been urged on the part of the appellant, that the sec. 3744 of the Revised Statutes of the United States has been modified by the subsequent legislation of Congress, as shown by the act of March 23, 1883, and the act of August 11, 1888, to the extent of dispensing with the formal execution of the contract as a prerequisite to its legality or binding effect, after accepting the proposal for doing the work or performing the service advertised. But we do not so read the provisions in the statutes referred to. They confer on the Secretary of War the powers of regulation and of prescribing forms for letting the work, but there is nothing that dispenses with the requirement that the contract shall be reduced to writing and signed by the parties thereto in accordance with the provisions of the sec. 3744 R. S. There is nothing in these later statutes that essentially conflicts with the former provision, and they stand well together.

3. Lastly, the third question presented must also be resolved against the contention of the appellant. As we have seen, in the instructions and specifications for the work, it was declared that any conditions, limitations or provisos attached to proposals would

be liable to render them informal, and cause their rejection. And, by another article, right was reserved to the Government to reject any and all bids, and to waive any informality in the bids received. The proposal filed by the appellant departed from the terms of the specifications in respect to the time for doing the work. The specifications required the work to be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Whereas, the proposal for doing the work was that the work should be commenced 90 days after the awarding of the contract, and the entire work to be completed on or before the 1st of June, 1894—thus extending the time for doing the work six months. Under the reserved right of rejection the Secretary of War had the right and power to reject the proposal of the appellant; and nothing had been done by either the local engineer or engineer-in-chief that deprived him of that power. His authority was paramount.

It follows that the order of the court below denying the writ of *mandamus* and dismissing the petition must be affirmed.

Order affirmed.

41 Court of Appeals of the District of Columbia, March Term, 1894.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY, Appellant,
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } No. 284.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause denying the writ of mandamus and dismissing the petition be, and the same is hereby, affirmed with costs.

Per Mr. Chief Justice ALVEY.

March 5, 1894.

42 Court of Appeals of the District of Columbia, March 13, 1894.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING CO., Appellant,
vs.
DANIEL S. LAMONT, Secretary of the Department of War. } No. 284.

On motion of Mr. A. S. Worthington, for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of $250.

43 Know all men by these presents that we, The International Contracting Company, as principal, and A. Ames Howlett and Perry G. Michener, as sureties, are held and firmly bound unto Daniel S. Lamont in the full and just sum of two hundred and fifty dollars, to be paid to the said Daniel S. Lamont, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the Court of Appeals of the District of Columbia, in a suit depending in said court between The United States *ex relatione* the International Contracting Company and Daniel S. Lamont, Secretary of the Department of War, a judgment was rendered against the said The International Contracting Company, and the said The United States *ex relatione* the International Contracting Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Daniel S. Lamont, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The United States *ex relatione* the International Contracting Company shall prosecute said writ of error to effect and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE INTERNATIONAL CONTRACTING CO., [SEAL OF CO.]
By A. AMES HOWLETT, *President.* [SEAL.]
A. A. HOWLETT. [SEAL.]
PERRY G. MICHENER. [SEAL.]

Sealed and delivered in presence of—
EDWARD D. TITTMANN.

Approved by—
R. H. ALVEY,
Ch. Justice.

I am satisfied with this bond.
A. A. BIRNEY, *U. S. Att'y.*

NEW YORK, *2nd April*, 1894.

Personally appeared before me A. A. Howlett, known to me & to me known to be the identical person named above, and subscribed and executed the foregoing.

Witness my hand and seal official the date above written.

[SEAL.] WASHINGTON MORTON,
Notary Public, New York County, No. 75.

44 DISTRICT OF COLUMBIA, *ss:*

Before me, a notary public in and for the aforesaid District, on this day personally appeared Perry G. Michener, known to me to be the identical person whose name is signed to the foregoing bond, and he subscribed and acknowledged the same to be his voluntary act and deed.

In witness whereof I have hereunto set my hand and official seal this fifth day of April, A. D. 1894.

[SEAL.] L. P. SQUIER,
Notary Public.

(Endorsed:) No. 284. Court of Appeals, District of Columbia. The International Contracting Company *vs.* Daniel S. Lamont, Secretary of War. Bond on appeal to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Apr. 5, 1894. Robert Willett, clerk.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The United States *ex relatione* the International Contracting Company, appellant, and Daniel S. Lamont, Secretary of the Department of War, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

46 UNITED STATES OF AMERICA, *ss:*

To Daniel S. Lamont, Secretary of the Department of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The United States *ex relatione* the International Contracting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, chief justice of Court of Appeals of the District of Columbia, this 5th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

R. H. ALVEY, *Ch. Justice.*

Service accepted this 5 April, 1894.
A. A. BIRNEY,
U. S. Att'y, D. C.

47 [Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 5, 1894. Robert Willett, clerk.

48 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the case of The United States *ex relatione* the International Contracting Company, appellant, *vs.* Daniel S. Lamont, Secretary of the Department of War, No. 284, March term, 1894, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington this 10th day of April, A. D. 1894.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 15,571. District of Columbia Court of Appeals. Term No., 1187. The United States *ex relatione* the International Contracting Company, plaintiff in error, *vs.* Daniel S. Lamont, Secretary of the Department of War. Filed April 11th, 1894.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 689.

THE UNITED STATES, ex-relations THE INTERNATIONAL CONTRACTING COMPANY,
Plaintiff in Error,

vs.

DANIEL S. LAMONT, Secretary of the Department of War.

BRIEF FOR PLAINTIFF IN ERROR.

WM. NELSON CROMWELL,
WM. J. CURTIS,
Of Counsel.

A. S. WORTHINGTON,
W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Plaintiff in Error.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 689.

THE UNITED STATES, *ex relatione* The International Contracting Company, Plaintiff in Error,

vs.

DANIEL S. LAMONT,
Secretary of the Department of War.

(15,571.)

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

By the River and Harbor bill, approved July 13, 1892, (27 Stat., 90) Congress made an appropriation for the improvement of Gowanus Bay channels in New York. The act, following the usual language of such bills, provides that the money shall be expended "under the direction of the Secretary of War and the supervision of the Chief of Engineers."

In August, 1892, Lieut.-Col. G. L. Gillespie, the proper

local engineer officer at New York, on behalf of the War Department, advertised for proposals for dredging the channels in question, giving notice that sealed proposals would be received at his office in New York until noon, September 14, 1892, when they would be publicly opened. The advertisement further stated that specifications, blank forms of proposals, and all available information would be furnished on application (Record, 2).

The relator obtained from the office in question the specifications referred to in the advertisement, including a blank form of contract made part of the specifications, and such other information as it desired. These specifications provided that the work must be begun October 1, 1892, and finished by December 31, 1893, but invited bidders requiring a special plant for the work to state when they would contract to begin (18).

Upon the back of the specifications was a blank form of proposal to be used by bidders, and there was appended to the specifications a form of guarantee to be signed by two sureties. This guarantee provided that, if the proposal should be accepted within sixty days from the date of opening the proposals, the bidders, within ten days after being notified of such acceptance, would enter into a contract with the United States in accordance with the terms and conditions of the advertisement, and would give bond with good and sufficient sureties for the faithful and proper fulfillment of the contract (19). One of these specifications, with the proposal filled up by the relator and the guarantee attached, was filed with Lieut.-Col. Gillespie by the relator in due season, and a copy thereof is "Exhibit A" to the petition in this case (Record, 14–20). By this paper the relator proposed to begin work in 90 days and to complete it by June 1, 1894, and reserved the right to suspend in the event of an epidemic prevailing (19)..

One of the provisions of the specifications is:

"25. The contract which the bidder and guarantors promise to enter into shall be in its general provisions in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office and will be furnished if desired to parties proposing to put in bids. Parties making bids should be understood as accepting the terms and conditions contained in such form of contract." (16.)

The relator, before making its bid, obtained a copy of the form of contract here referred to, and made its bid in reference thereto (5). A copy of this blank is made "Exhibit D" to the petition in this case (22–25).

Several other proposals were filed, and at the time and place fixed by the advertisement Lieut.-Col. Gillespie opened all the proposals. The relator was the lowest bidder and he so found, and, as required by law and the regulations thereunder, he fowarded all the proposals and accompanying papers to the Chief of Engineers at Washington, recommending that the contract be awarded to the relator as the lowest bidder (3). That officer approved his recommendation and returned the paper to him for proper action (3).

Accordingly, on the 22d of September, 1892, Lieut.-Col. Gillespie, on behalf of the War Department, formally accepted the relator's proposal and instructed the relator to furnish him with the names and addresses of its proposed sureties, each to justify in the sum of $45,000, adding, however, that the execution of the bond would be deferred until the completion of the "articles of agreement" (4). The principal question in this case is whether this closed the contract between the relator and the Department in view of the provisions of Section 3744 of the Revised Statutes. See page 17 of this brief.

The relator promptly furnished the names of its sureties

(5), and they were satisfactory to the Chief of Engineers (6). Afterwards, Stephen B. Elkins, then Secretary of War, as such Secretary, upon the application of a rival and unsuccessful bidder, instructed the Chief of Engineers not to enter into the proposed articles of agreement, nor to recognize the rights of the relator under its proposal and the acceptance thereof, and against the demand of the relator that a contract with it be executed, and against its wishes and protest (6–7), caused the work to be readvertised, calling for new bids to be filed on or before the 21st of December, 1892.

Thereupon the relator applied to the Chief Justice of the Supreme Court of the District of Columbia for a mandamus requiring the Secretary of War to execute and deliver to the relator a contract in accordance with its accepted proposal. This application was certified by Chief Justice Bingham to the Court in General Term to be there heard in the first instance. That case was argued in the General Term on December 20, 1892, the day before the new letting was to take place. On the following morning, at ten o'clock, only two hours before the bids at the new letting were to be opened, the Court in General Term, by Mr. Justice Cox, delivered a verbal opinion denying the relief sought. This opinion has never been reported. The relator at once sued out a writ of error to this court.

After its proposal of September 14, 1892, had been accepted, and after it had been notified by Lieut.-Col. Gillespie of that fact, and that as soon as the formal contract could be prepared it would be required to sign it (4), the relator entered into contracts for the building of a plant for doing the work in question, and the building of the plant was at once begun, so that in this way the relator became bound to take the plant when finished, and to pay for it, thus incurring obligations to the amount of nearly two hundred thousand dollars (10). This was

before it had received any intimation that the Secretary of War proposed to interfere (10). Even after the relator was notified that the Secretary of War had called for the papers and was investigating the matter, it could not tell what his final action would be, and was, therefore, compelled to go on with its preparations for doing the work.

When, therefore, the Supreme Court of the District, in General Term, refused to grant a mandamus, and the new letting was proceeded with on the 21st of December, 1892, the relator, to save itself from great and irreparable loss if the work should be re-let to some other contractor, and it should thus be left with its plant on its hands, submitted a bid at the new letting; accompanying this bid, however, with a letter to Lieut.-Col. Gillespie, referring to the pending suit, and informing him that it did not waive, but would insist upon its rights under its former accepted proposal, and that it would claim as damages the difference between the amount of its two bids (8, 10, 25). The relator was again the lowest bidder, and the contract was again awarded to it. The estimated amount of the work was about 900,000 cubic yards (8). The relator's original bill was $19\frac{7}{10}$ cents per cubic yard (19); its bid at the second letting was $13\frac{7}{10}$ cents per cubic yard (8); its loss, therefore, by this proceeding is about $54,000.

Before the suit referred to was reached in this court, Mr. Elkins ceased to be Secretary of War, and the present respondent, Daniel S. Lamont, was his successor (12). Under Boutwell *vs.* The United States, 17 Wall., 604, this abated the suit. A formal order to that effect was thereupon made here (12, 26). Afterwards, the relator requested Secretary Lamont to execute and deliver to it a contract conforming to its accepted proposal of September 14, 1892 (12), and this request was refused (12, 26). Thereupon the present suit was begun.

For ten years prior to September, 1892, a combination had existed to which nearly all the principal dredge owners along the Atlantic coast of the United States were parties, the object of which was to enable the combination to do all such work at its own price. The existence of this combination, and the methods which it used to keep up the appearance of competition and yet crush all competitors, are fully set forth in paragraph X of the petition in this case (8,9). The unsuccessful bidders at the letting of September 14, 1892, were all members of this combination, and it was through their efforts while acting for the combination that the Secretary of War was prevailed upon to re-let this work (9, 10).

Upon the filing of the petition in the present case, a rule was issued requiring the respondent to show cause why a writ of mandamus should not issue as prayed (29). The respondent demurred to the petition (30). Thereupon it was stipulated by the parties to the suit that the rule to show cause should be considered as embracing the facts set forth in the petition and should stand for an alternative writ of mandamus. The case was heard before Justice Cox, who dismissed the petition (31). No opinion was filed.

The relator took the case by writ of error to the newly-created Court of Appeals of the District of Columbia and that court affirmed the judgment below (42). The relator then sued out a writ of error to this court (42). The opinion of the Court of Appeals was delivered by Chief Justice Alvey and is in the record (35).

Assignments of Error.

The Court of Appeals erred:

First. In affirming the judgment of the Supreme Court of the District of Columbia dismissing the petition.

Second. In refusing to reverse that judgment and to remand the case with instructions to issue a writ of *mandamus* in accordance with the prayer of the petition.

Third. In holding that the relator is concluded as to its rights under its first proposal by entering into a contract under its last proposal.

Fourth. In holding that the Secretary of War had any discretion as to signing the formal articles of agreement under the first letting after the relator's proposal at that letting had been accepted.

ARGUMENT.

I.

The unconditional acceptance by the War Department of the relator's proposal of September 14, 1892, completed a contract from which neither of the parties thereto was thereafter at liberty to withdraw without the consent of the other.

Many decisions are to be found in the reports, English and American, upon the question whether when the minds of the parties have met upon all the terms of a contract they are yet not bound for the reason that it appears that it is their intention that their agreement shall thereafter be reduced to a formal written contract to be by them signed.

It is well settled that they are bound unless it affirmatively appears that their intention that the agreement shall not take effect until the formal writing has been prepared and signed.

Chinnock *vs.* Marchioness of Ely, 4 DeG., J. & S., 638.
Bonnewell *vs.* Jenkins, L. R. 8, Ch. Div., 70.
Rossiter *vs.* Miller, 39 L. T. Rep., N. S., 173.
Cheney *vs.* Eastern Transp. Line, 59 Md., 557.
3 Eng. & Am. Enc. of Law, 854, etc., and notes.

But we need not examine minutely the cases on this general proposition for the reason that there is no question that where competitive bids or proposals are invited and the proposal of one of the bidders is accepted, the contract is complete, although, as is nearly always the case, in Government contracts at least, both parties expressly contemplate executing thereafter a formal instrument evidencing the contract.

Garfielde *vs.* U. S., 93 U. S., 242.
Harvey *vs.* U. S., 105 U. S., 671.
Adams *vs.* U. S., 1 Court of Claims, 192.
Moore *vs.* U. S., 1 Ct. Cl., 90.
Schneider *vs.* U. S., 19 Ct. Cl., 547.
McCollum's Case, 17 Ct. Cl., 92.

In the present case, the statutes governing such transactions leave no question that the acceptance of the relator's proposal completed the contract.

An act of Congress, approved April 10, 1878 (20th St., 36), provided as follows:

"That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department, and he may require any bid to be accompanied by a bond in such penal sum as he may deem advisable, with good andsufficient security, conditioned that the bidder will enter into a contract agreeable to the terms of his bid, if the same be awarded to him within sixty days from the date of the opening of the bids, or otherwise pay the penalty. No bid shall be withdrawn by the bidder within the said period of sixty days."

On March 3, 1883 (22 Stat., 487), this act was amended so as to read as follows:

"The Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the prepar-

ation and submission and opening of bids for contracts under the War Department and he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, *if his bid is accepted*, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed and to perform the service required. *If, after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer, to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary of War, or other authorized officer, shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted* with another party to furnish the supplies or perform the service for the whole period of the proposal *to be charged up against the bidder* and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in action of debt against either or all of such persons."

The specifications in this case expressly refer to this act (15). They also inform the bidder that he may withdraw his proposals at any time before the hour fixed for opening the proposals (15), and by necessary implication that he can not do so after the bids are opened.

The bidder is further told by the specifications that he will be required to enter into a written contract with the United States with good and approved security in an amount equal to 25 per cent. of the money value of the contract within ten days after being notified of the acceptance of his proposal (16). Stringent provisions are prescribed to establish the sufficiency of the sureties.

(Specifications, paragraph 26, Record, 16.) The bidder is required to agree, when he files his proposal, that after receiving written notice of its acceptance he will enter into contract within the time designated (19), and he is required to file with his proposal, a guarantee with sureties, that within ten days after being notified of the acceptance of his proposal he will enter into the contract. Such a guarantee was actually given in this case, and the sureties justified in the sum of $30,000 before the Collector of the Port of New York (20, 21). This guarantee, following the above-quoted act of Congress, gives to the Government, in case the bidder, upon the acceptance of his proposal, shall refuse to enter into the formal contract, the right to re-let the work at his expense.

In the face of all this, it can not, we think, be fairly contended that, if the acceptance in this case was authorized, the contract was not complete when the relator received notice that its proposal was accepted.

II.

The acceptance was authorized.

The precise facts, admitted by the demurrer, as to the acceptance of the contract in this case are as follows:

The advertisement inviting bids for the work was published by Lieutenant-Colonel Gillespie "by authority of the Chief of the Corps of Engineers and of said Secretary of the Department of War" (2). The bids submitted were opened on September 14, 1892, by Lieutenant-Colonel Gillespie, who, after making the necessary computations, found that the relator was the lowest bidder. He thereupon forwarded all the bids to the Chief of Engineers in Washington, recommending that the contract be awarded to the relator (3). This communication reached the office

of the Chief of Engineers on or about September 17, 1892. On September 19, 1892, Lieutenant-Colonel Gillespie's recommendation was approved in writing and returned to him "by Maj. Henry M. Adams, an officer of said Corps of Engineers, who was then and there acting Chief of Engineers, and was in charge of said office by virtue of a general order of the Secretary of the Department of War, made by authority of law, and dated January 18, 1889."

Copies of the recommendation of Lieut.-Col. Gillespie, and of the approval of the acting Chief of Engineers, as well as of the general order of January 18, 1889, referred to, are appended to the petition as "Exhibits A, B, and C," respectively (21, 22).

Having received back from the Chief of Engineers his recommendation so approved, Lieut.-Col. Gillespie, September 22, 1892, wrote and caused to be delivered to the relator the letter of that date which is incorporated in the petition (4), by which he notified the relator that its bid had been accepted by the Chief of Engineers.

Between the last-mentioned date and October 4, 1892, the attention of the Acting Secretary of War had been called to this matter, and General Casey, the Chief of Engineers, who had in the meantime returned to his post, wrote to the Acting Secretary the letter of October 4, 1892, which is also to be found in the body of the petition (6). In this letter General Casey, after reviewing the situation, states his conclusion in the following words:

"In view of all the facts, no other course than to perfect the contract with The International Contracting Company seems to me possible."

In the opinion of the Court of Appeals in this case it is held that the acceptance of the relator's proposal by the Chief of Engineers did not conclude the Secretary of War.

Our contention is that the action of the Chief of Engineers in this matter was in legal effect the action of the Secretary of War, and that the relator upon the receipt of Lieut.-Col. Gillespie's letter of September 22, 1892, was placed in the same position as it would have been had that letter been signed by the Secretary of War himself.

The question involved, it will be seen, is whether the Secretary had delegated to the Chief of Engineers the power to make such a contract as this, and, if so, whether that delegation was by authority of law.

This question was very fully argued in the Court of Appeals, but very little is said upon the subject in the opinion of that court.

That the President of the United States may perform the executive duties conferred upon him by law through heads of departments, and that acts done under such general authority for him by the heads of departments, in their own name, are in legal effect the acts of the President himself has been so often determined by this court that it is no longer the subject of controversy. (Williams *vs.* U. S., 1 How., 290; Parker *vs.* U. S., 1 Peters, 297; U. S. *vs.* Eliason, 16 Peters, 301; The Confiscation Cases, 20 Wall., 109.) The analogous question as to the right of the heads of departments to exercise powers conferred upon them through the heads of bureaus, appears not to have been expressly decided by this court. In the case of Miller *vs.* Mayor of New York (109 U. S., 394), it appeared that authority had been given to erect the Brooklyn Bridge over the East River when the plans for the bridge were approved by the Secretary of War. The notification of such approval which was given the bridge company was signed by the Chief of Engineers, who stated that he was acting under the direction of the Secretary of War. It was contended that this was not a sufficient compliance with the act of Congress because the

notification should have been by the Secretary himself. On this subject Mr. Justice Field, delivering the opinion of the court, says:

"When a secretary of the government is required to give information on any subject he may act, and generally does act, through officers under him. He is not expected to make, over his own signature, all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him, when it is made under his sanction and direction."

In that case, however, the question of approving the plans had been submitted directly to the Secretary of War by the Chief of Engineers, and the latter's letter of notification was written in accordance with written instructions from the Secretary.

But it is submitted that there is no legitimate distinction between the power of the President to perform his functions through the heads of departments and the powers of the latter to exercise their authority through the heads of bureaus. The reasons assigned by this court for recognizing the right of the President to delegate his authority apply with equal force to the delegation by the heads of departments of their authority. In Williams *vs.* U. S., 1 Howard, 290, it is said:

"It is insisted upon as the correct interpretation of this statute, that the power thereby vested to make advances for the public service, is not one appertaining to the office of President, but is an authority strictly personal and ministerial, to be exercised in every instance only by the individual himself, by his own hand, and never in any respect to be delegated. Such an interpretation of the law this court can by no means admit. While it has been, doubtless, the object of Congress to secure economy and regularity in public disbursements, and for that end to limit as far as was proper, the discretion of subordi-

nate agents over the public money, it never can be reasonable to ascribe to them a conduct which must defeat every beneficial end they could have in view, and render the Government an absolutely impracticable machine. The President's duty in general, requires his superintendence of the administration; yet this duty can not require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the constitution and laws, required and expected to perform. This can not be, first, because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It can not be, for the stronger reason, that it is impracticable, nay, impossible."

Manifestly it is equally impossible for the Secretary of War to act in person in regard to all the contracts for services and supplies required by his department.

But we are not required to draw the power of the Secretary of War to delegate his power to the Chief of Engineers from general principles. The matter is fully covered by statutes and by regulations having the force of law.

The very section of the Revised Statutes, the interpretation of which is the main question in this case (Section 3744), refers to contracts made by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior "*or by their officers under them appointed to make such contracts.*" The next section, 3745, provides that the officer in making his return under section 3744 shall make affidavit "that the copy of contract hereto annexed is an exact copy of a contract made *by me* personally with —— ——; that I made the same fairly," etc. Section 3746 provides how "every officer who makes any contract" and fails to make proper return thereof shall

be punished. Section 3747 makes it the duty of the Secretaries mentioned "to furnish every officer appointed by them with authority to make contracts on behalf of the Government" with a printed letter of instructions.

Section 3714 is in these words:

"All purchases and contracts for supplies or services for the military and naval service shall be made by or *under the direction of* the chief officers of the Departments of War and of the Navy respectively."

By Section 3709 it is provided that all purchases and contracts for supplies or services in any of the departments, except for personal service, shall be made by advertising for proposals except "when immediate delivery or performance is required by the public exigency," in which case the articles or service may be procured in the ordinary manner usual between individuals.

If the opinion of the Court of Appeals is correct, no valid contract could be made in such an emergency without sending for the Secretary of War and having him give his personal presence and attention to the matter.

So, in the act of March 3, 1883 (22 Stat., 487), which appears on page 8 of th is brief, it is provided that the Secretary of War may require each bid to be accompanied by a written guarantee that the bidder will give bond with sureties "at such time as may be prescribed by the Secretary of War *or the officer authorized to make a contract in the premises.*"

Manifestly the power to delegate to the Chief of Engineers authority to make this contract existed. The next question is, Was that power exercised?

By section 1683 of the army regulations which were in force at the time of the transactions involved in this suit the duties of the Corps of Engineers are defined as including "the execution of river and harbor improvements

assigned to it" (27, 28). By section 1684, the Chief of Engineers is charged, under the direction of the Secretary of War, with the command of the engineer department, including its bureaus, and it is said, by virtue of this authority "he directs the affairs of his department, and gives such orders to officers and soldiers and to all persons and individuals connected therewith, as the interests of the service demand" (28).

Article LVII of the Army Regulations relates to contracts and purchases by the bureaus of the War Department, and under this article are the following sections:

Section 651, which is addressed to "officers whose duty it is to contract for the Government" (29).

Section 652, which says "contracts shall be made in the name of, *and shall be signed by, the chief officer of that branch of the staff of the command to which they pertain*" (29).

Section 653, which is as follows:

"Upon receipt of the contract at the proper bureau of the War Department, it will be examined to see that it complies with the laws, regulations and orders. *If found correct, the approval of the proper officer will be endorsed thereon.* Should any illegality be discovered it will be submitted to the Secretary of War for his action."

In addition to all this, certain regulations applicable to the Engineer Bureau alone and issued by the Secretary of War, by authority of law, were in force in September, 1892 (11, 12).

Section 68 of these regulations expressly provides that when bids are opened and it is determined to enter into formal written contracts with bidders, "no such bid will be accepted or rejected by the officer in charge of work *in advance of approval by the Chief of Engineers.*"

Section 70 provides that all contracts and papers con-

nected with the same "made by officers of the corps or agents in charge of works" shall be made "in accordance with the printed forms prescribed by the Secretary of War."

Finally, the form of contract (22), which was one of the "blank forms" referred to in Lieut.-Col. Gillespie's advertisement (2), and which, in accordance with the above-quoted regulation 70, had been prescribed by the Secretary of War (5), concludes in this way:

("Executed in quintuplicate.)

"Approved ——, 189–.

"—— ——,

"*Brig.-Gen., Chief of Engineers.*"

Perhaps we have been at unnecessary pains to establish an indisputable proposition—that contracts with the War Department binding upon the Government may be made without the personal intervention of the head of that Department; but we do it because this proposition seems to have been assumed by the Court of Appeals to be unwarranted.

III.

The acceptance of the relator's proposal of September 14, 1892, completed a valid contract between the parties, notwithstanding the provisions of Section 3744, of the Revised Statutes.

Section 3744 is as follows:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the contract in

the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order according to the number of papers composing the whole return."

The construction of this section is the main question in this case. It was decided against the relator by the Court of Appeals, upon the authority of Clark *vs.* The United States, 95 U. S., 539; and South Boston Iron Co. *vs.* The United States, 118 U. S., 37, 42.

Both these cases differ essentially in their facts from the case at bar. In Clark *vs.* U. S., the contract was entirely verbal. In South Boston Iron Co. *vs.* U. S., an offer was made and accepted in writing, but the acceptance concluded with this statement:

"The specifications and drawings will be furnished as soon as prepared."

In its opinion in the latter case this court says:

"An effort has been made in this case to show a contract in writing, but we concur entirely with the Court of Claims that the papers relied upon for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and therefore the United States never became bound."

The decision of the Court of Appeals in this case, therefore, is the first adjudication that when bids have been invited under a law requiring a contract to be awarded

to the lowest bidder, and the law has been complied with by the formal written acceptance by the proper officer of the proposal submitted by the lowest bidder, the contract between the parties is not complete. The Court of Appeals squarely held that in such a case there is no contract until the formal articles of agreement almost universally provided for in the specifications themselves shall have been signed by both the contracting parties.

The novelty and importance of this decision justifies a careful examination, not only of the law itself and the decisions of this court relating to it, but of the circumstances which led to its enactment and the intentions of Congress as manifested by its journals and records (Blake *vs.* National Bank, 23 Wall., 219). From these records it will be seen that it is highly probable that this act would not have received a single vote if it had been understood to mean what the Court of Appeals has decided that it does mean.

We find no report of any committee as to the object of this measure, but a question arose in the Senate as to its meaning, and on the floor of the Senate those who were responsible for it stated its purpose and supposed effect.

The bill was favorably reported by the judiciary committee of the Senate July 23, 1861 (Cong. Globe, 1st Sess., 37th Cong., 226). As reported it applies only to the Secretary of the War and the Secretary of the Navy. On the 26th of July, 1861, the bill was amended in the Senate so as to apply to the Secretary of the Interior also, no reason being given for this change. The bill thereupon passed without discussion or explanation (*Id.* 276). A day or two afterwards the bill passed the House of Representatives without discussion (*Id.* 352), with two merely verbal amendments (*Id.* 343). When the bill was again laid before the Senate for its action on the House amendments, a debate sprung up in which it was averred by

Senator Wilson, of Massachusetts, that General Meigs, then Quartermaster-General of the Army, had stated that the war could not be carried on if the bill passed, and Senator Wilson himself at first said in regard to the bill, "I am satisfied that if it passes it will cripple this government beyond calculation" (*Id.* 369). It was replied to this by other Senators that Gen. Meigs and Senator Wilson misunderstood the object of the bill. On this subject Senator Browning said: "Its whole scope is to require that, at a reasonable time after the contract is made, the contract shall be reduced to writing, verified by affidavit, and filed in the appropriate office. * * * I do not suppose it would suspend the power of the offices to go on and contract just as they have contracted heretofore, but as soon as they can conveniently, they will furnish a form of contract which will be as nearly uniform as possible. In the meantime, I apprehend they can go on and contract as they have done, reducing these contracts to writing within the time prescribed by the bill, verify them by affidavit, and file them. I think that is the whole scope of the bill, and it does not, in any sense or to any extent whatever, interfere with existing laws. There is no provision in this bill repealing any pre-existing law; nor is there any incompatibility between it and the existing laws which would, by implication, repeal any of them" (*Id.* 371).

Thereupon Senator Wilson said:

"With the construction Senators of great legal ability put upon this bill, I certainly have no objection to it; and I withdraw the motion made for re-consideration." (*Id.* 371).

Without further debate the Senate thereupon unanimously concurred in the House amendments (*Id.*) This was on August 1, 1861.

On August 2, 1861, Senator Fessenden offered a reso-

lution requesting the House to return the bill to the Senate in order that another motion to re-consider might be made. In support of this resolution Senator Wilson caused to be read a letter from General Meigs in which the latter forcibly renewed his objections to the bill, saying, among other things:

"If, in addition to these duties, they [army officers] are called upon to record in writing every verbal contract; to put it upon a certain piece of printed paper of certain shape; to go before a magistrate and take in every case a certain oath; delay, irresolution, inefficiency, will take the place of promptness and energy; suffering, discontent, and defeat will attend our armies. * * * The law of 1861, Chapter 84, Section 10, in regard to public contracts, contains all that is really needed to secure the public. More legislation will merely embarrass and delay the public service." (*Id.* 403.)

The law of 1861 here referred to by General Meigs is the act above mentioned, now incorporated in Sec. 3709 of the Revised Statutes of the United States, which requires that ordinarily advertising shall precede the making of contracts for supplies or services, but permits them to be procured by open purchase or contract when "required by the public exigency."

Thereupon followed another debate about the bill—the whole question being whether the bill meant what General Meigs understood it to mean. In that view it had no defenders. The contention of those who supported the bill was as before, that it did not interfere with the *making* of contracts under pre-existing laws. (*Id.* 403, 404, 405.) Finally the bill was laid upon the table by a vote of 26 to 9. (*Id.* 406.) This was August 2, 1861.

At the following session of Congress, on January 7, 1862, on motion of Senator Powell, who had been the principal champion of the bill in the Senate at the for-

mer session, the bill was taken from the table. After a short debate, on motion of Senator Fessenden, it was recommitted to the committee on the judiciary. During this debate, as in the debate at the previous session, the only question was whether General Meigs' understanding of the bill was correct, and on that subject Senator Powell said:

"I think the distinguished head of that bureau, General Meigs, misconceived the bill utterly."

Senator Fessenden stated as the ground for his motion for referring the bill back to the committee—

* * * "That we may have the advice of the head of the quartermaster's department as to how far we can go with reference to that, in order to effect the object which we desire, without seriously embarrassing him; because that is an important thing, especially in the present condition of affairs." (Cong. Globe, 2d Session, 37th Cong., Part I, 206, 207.)

Nothing further took place in regard to the bill until May 30th, 1862, on which day the committee on the judiciary reported it back with a recommendation that the Senate concur in the House amendments. The recommendation of the committee was at once concurred in by the Senate without discussion (Cong. Globe, Second Session, 37th Cong., Part 3, 2440).

In the light of this contemporaneous history, it is clear that nothing was further from the intention of Congress in passing this bill than to prohibit the making of verbal contracts. Its real object was to require the heads of departments, and their subordinates who are authorized to enter into contracts for them, to have those contracts reduced to writing within thirty days after they were made, and filed, with the accompanying papers, where the public could have access to them. If Congress, in 1862, had

prohibited contracts for supplies or services in the War and Navy Departments from being made at all, except in the manner specified in this act, it would have crippled the Federal armies. Being advised of this by General Meigs, the bill was held until after a conference between the Senators having the bill in charge and the Quartermaster-General, all parties became satisfied that contracts could be made just as they were made before, and that the only change made by the act was to provide for putting them into writing afterwards, and having them filed in a proper place.

In Clark *vs.* United States, in which case, it will be remembered, the contract was wholly verbal, Mr. Justice Bradley, speaking for the majority of the court, agreed with the Court of Claims that Section 3744 was intended as a statute for preventing frauds and perjuries, and "make it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties" (95 U. S., 542). Mr. Justice Miller filed a dissenting opinion which was concurred in by Mr. Justice Field and Mr. Justice Hunt. The dissenting justices concurred in the conclusion reached by the court, but were of opinion that by the act in question Congress did not intend "anything more than to regulate the conduct of its own officers in compelling them to furnish all the evidence in their power of the contract and the circumstances attending its negotiation." The arguments advanced in the dissenting opinion are identical in substance with those used on the floor of the Senate when the act was on its passage and which received the assent of all who spoke on the subject.

South Boston Iron Co. *vs.* United States (118 U. S., 37) refers to Clark *vs.* United States as deciding "that, to bind the United States, contracts by the Navy Department must be in writing and signed by the contracting

parties," and disposes of the case before the court, in a few words, on the ground already stated that the papers relied on in that case as a contract in writing were only "preliminary *memoranda*."

But there is a later case in this court which is precisely in point and which, we submit, effectually disposes of this question in our favor In this view we urged it upon the Court of Appeals, but it is not mentioned in the opinion of that court. We refer to Harvey *vs.* United States, 105 U. S., 671, decided in 1881.

In that case there had been an advertisement, a formal proposal, and an acceptance thereof, as in the case now before the court, and in addition the parties drew up and executed the formal articles of agreement.

But in preparing these articles the terms of the proposal were not followed, there being a substantial variance which threw upon the contractor the expense of constructing a part of the work, which, by the specifications referred to in the proposal, the Government was to do, and this court held *that the real contract between the parties was that which was completed when the proposal was accepted*, and that the clause in question was to be deemed as having been inserted in the formal articles of agreement by mistake. The suit having been brought in the Court of Claims under an act of Congress which authorized that court to proceed according to the rules and principles of equity jurisprudence, it was held that it was its duty to reform the formal written articles of agreement and *make them conform to the real contract between the parties.* Mr. Justice Blatchford, in delivering the unanimous opinion of the court, said:

"The written bid, in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam

work. (Garfielde *vs.* The United States, 93 U. S., 242; Equitable Insurance Co. *vs.* Hearne, 20 Wall., 494.) The written contract in that respect was intended by both parties to be merely a reduction to form of the statement, as to work and prices contained in the bid. If the formal contract is susceptible of a different construction, to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the Government were under a mistake. * * * There is no evidence to show that the parties intended to alter the terms of the bid, as to work and the prices. * * * We are of opinion that *by the actual contract* between the parties, the appellants were not to do any of the work covered by the claim, made by them under item 1 of the petition herein, and that *the written contract must be reformed accordingly.*"

In the case at bar, the court below held that the formal acceptance of such a bid does not make a contract at all. This is in direct conflict with Harvey *vs.* United States. Disastrous indeed to the interests of the Government would it be for this court to uphold the doctrine laid down by the Court of Appeals. If the acceptance of the proposal in these cases does not bind the Government, the contractor is not bound. If the Government is thereafter at liberty to change the terms of the agreement before entering into a formal contract, so necessarily is the bidder. All the complicated machinery of specifications, proposals, guarantees and justification of guarantors, which has been devised to enable the Government to compel the bidder either to do what he has proposed to do, or to make good to the Government the damages resulting from his refusal, becomes useless. The successful bidder, when a formal agreement is laid before him, having ascertained, perhaps, that he can not do the work or furnish the supplies at a profit, may refuse to sign it, and the Government has no remedy but to begin again

the work of seeking for a satisfactory bidder. This may be repeated indefinitely. Sham bids, supported by the best of guarantees, signed by the best of sureties, may be safely filed merely for the sake of making trouble. Indeed, there would be no further benefit to be derived from advertising for proposals. The statutes requiring this to be done, and the work to be given to the lowest responsible bidder, might as well be repealed.

Consider, too, the injustice to bidders resulting from a contrary rule. This relator, for instance, when notified of the acceptance of its proposal was required to, and did, immediately contract for the building of a plant to do the work—a plant costing $200,000. According to the contention of the respondent it might have had this plant completed and have paid for it in full without notice of dissatisfaction on the part of the Secretary of War and then have been turned off without any right to complain. For when is the power of the Secretary to interfere at an end if not when the proper officer of his Department has accepted such a proposal? Not when the articles of agreement are signed, because those, too, are signed only by the Chief of Engineers, and if his signature does not conclude the Secretary by the acceptance of the proposal it does not when appended to the articles of agreement. It may safely be said that if the decision below in this case is the law, there is not a valid contract for river and harbor improvements in existence in this country.

And even if section 3744 originally had the meaning ascribed to it, it must be deemed amended as to the War Department by the acts of April 10, 1878, and March 3, 1883, above quoted. It is impossible to read the later of these acts, especially, in any other way than as declaring such contracts as this closed when the proposal is accepted.

IV.

The clause in the relator's proposal of September 14, 1892, as to the time of beginning and completing the work, and as to suspending it during the prevalence of an epidemic did not render the acceptance void.

In the opinion below the question is discussed whether the insertion of this clause in the relator's bid gave the War Department in its discretion the right to reject it, and, finding in the affirmative, the court holds that to be fatal to our claim.

In this the court wholly misunderstood our position. Our claim was and is that the War Department exercised its discretion by accepting the bid as made. If that acceptance was not final then we have no case. We never controverted that the Department had a right to reject the bid. The only question that can arise here is whether the conditions of the bid as to the time of beginning and finishing the work and suspending it during a pestilence, were such as to make it illegal for the Department to award the contract to the relator. That question we proceed to consider.

The statute under which this work is to be done leaves the matter of the time within which it shall be begun or finished, entirely at the discretion of the Secretary of War (27 Stat., 90).

Nor is there anything on this subject in the advertisement inviting bids (2). That advertisement informs the public that specifications, blank forms, and *all available information* will be furnished on application. This not only indicates that the specifications alone did not contain all the data that bidders would require, but shows affirmatively that information outside of them, presumably important for bidders to possess, would be commun-

icated orally to anybody who made proper inquiry at the office of the local engineer in New York. Hence, even if the specifications fixed an absolute limit for the beginning of the work and for its completion it was entirely competent for the engineer officer in charge to verbally notify persons proposing to bid, when handing them the specifications, that if the interests of the Government would be subserved by a reasonable extension of the time, either for beginning or completing the work, or both, the War Department might grant such an extension.

But the specifications themselves disclose that the time mentioned in them for doing the work was to be considered merely as an approximation. Under the head of "*Time*" it is announced, first, that the work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893; and, next, that "contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work" (18).

Here was a provision intended for the protection of the United States. For ten years work of this character on the Atlantic coast, amounting to many millions of dollars, had been controlled by a great combination, which had either absorbed or forced out of business all dredging companies along that coast (8, 9). Unless this monopoly could be broken it was certain that several bids would be filed, and that they would be so arranged that that member of the combination to whom this particular work had been assigned by the combination, would be the lowest bidder, and would get the work at the price fixed in advance by the combination. There was no way to prevent this except by encouraging the building of new plants by persons not concerned in the plot.

Therefore a clause was inserted to stimulate those who might wish to go into the business *de novo*. As the bids were to be opened on the 14th of September, it was entirely out of the question for anybody to bid safely who had to provide the machinery for doing the work, if it was to be begun on the first of October. A large part of the intermediate time would necessarily be used in transmitting the papers to the Chief of the Engineers, receiving them back from him, notifying the successful bidder, preparing a bond, passing upon the sufficiency of the sureties, and executing and delivering the formal contract. Hence, the specifications gave notice to all concerned, that a day after the first of October—and a day sufficiently later to admit of the construction of an entire dredging plant—might be named for beginning the work, and that such a proposal would receive due consideration by the Department. Indeed, each bidder was required to agree to do the work if his proposal should be accepted within sixty days from September 14, 1892 (19), showing conclusively that it was not deemed essential that the work should be begun on or before October 1.

It can not be said that the provision as to those who had to build a plant affected the beginning of the work, nor its completion. It is to be presumed that the fifteen months allowed for doing the work was necessary, and that delay in beginning operations would necessarily be followed by a corresponding delay in finishing the work. Certainly this is a reasonable conclusion, when the time required for building a complete dredging outfit is considered. There are other provisions in the contract papers which show that time was not considered of the essence of the proposal. Paragraph 35 of the specifications deals entirely with the matter of extension of the time for doing the work (16).

Besides, the specifications provide otherwise for just such variances in the bids as those now under consideration. By paragraph 23 of the specifications the United States reserves the right not only to reject any and all bids, but to waive any informality in the bids received (15). It will not do to say in reply to this that the word "informality" refers to minor imperfections in the preparation of the proposal and accompanying papers, because paragraph 17 of the specifications expressly says: "Any conditions, limitations or provisos attached to proposals will be liable to render them *informal* and cause their rejection."

The bidder himself is not allowed to take advantage of any error or omission in the specifications. This is expressly provided by paragraph 31 of the "General Conditions" (16).

All these provisions were inserted in the interest of the United States. It is to be remembered that the Secretary was not required to have this work done by contract at all. Ever since 1888, money appropriated for the improvement of rivers and harbors is to be applied "in carrying on the various works, by contract or otherwise, as will be most economical and advantageous to the Government" (25 Stat., 423). This, among other reasons, no doubt moved the Department to insert in the specifications the provision that the United States reserves the right to reject any and all bids. This is a great power and one not conferred in so many words by the statute. If such a power can be implied, why not the power to change a date?

By article 71 of the Army Regulations, the Chief of Engineers is expressly authorized to grant such extensions (12).

In the case of Solomon *vs.* The United States, 19 Wallace, 17, it was held that a subordinate officer of the

War Department might verbally extend the time within which a contractor was required by his contract to furnish supplies to the Department. That was a suit by the contractor, in the Court of Claims, to recover the contract price for supplies furnished during the extended period, and it was claimed by the Attorney-General that under the act of June 2, 1862 (now Section 3744, Revised Statutes; see page 17 of this brief), the supplies in question must be deemed to have been furnished under an oral contract, which was void because not in writing. Mr. Justice Miller, speaking for the court, says:

"The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of the matter accepting delivery of such supplies after the time stipulated, nor is a verbal agreement to extend the time of performance invalid."

In Manufacturing Company *vs.* United States, 17 Wall., 592, the contractor had not furnished any of the carbines contracted for within the time fixed by its contract, yet it was held that certain changes which were made in the construction of the arms, at the request of the Government, of itself worked an extension of the time. The contract in that case was made in 1863, but it was not even suggested that the act of 1862 (now Sec. 3744 of the Revised Statutes) had any application to the case.

In the case of Chicago *vs.* Greer, 9 Wallace, 726, it appears that the city had advertised for fire-hose "warranted to stand a pressure of 200 lbs. to the square inch." Greer made a bid in writing, stating that the hose he proposed to furnish was "to be tested in a fair and impartial manner, and to be made to stand 200 lbs. pressure to the square inch." This was a clear departure in the proposal from the terms of the advertisement, but this court held that when such a proposal was accepted it was too

clear for argument that the proposal and the acceptance completed a contract between the parties.

These decisions and the action of the Chief of Engineers in accepting the bid of the relator in this case, all conform to a natural principle of justice which is embodied in Army Regulation 639, which is as follows:

"Slight failures on the part of a bidder to comply strictly with the terms of the advertisement should not necessarily lead to the rejection of his bid; but the interest of the Government should be fully considered in making the award." (28)

There is no middle ground. The acceptance in this case was good and completed the contract, or it was void. If void, the vice would have extended to the formal articles of agreement had they been prepared, and the relator could have refused to sign them or to comply with them with impunity. Had that course been pursued and this were a suit by the Government on the relator's bond, would *we* be heard to say that there was no contract?

The same argument applies to that clause of the proposal which refers to the prevalence of an epidemic. On the 14th of September, 1892, when these bids were opened, cholera ships were quarantined in the very harbor where this work was to be done. To provide for a suspension of operations while the plague was flagrant was no more than would have been done in any event. The War Department had the power certainly to consent to such a provision, and that is all that is required.

V.

The duty of the Secretary of War, to cause articles of agreement to be signed in this case, is a ministerial duty, and not one involving the exercise of discretion.

In the opinion of the Court of Appeals in this case it is assumed that the question to be decided is whether it in-

volved judgment and discretion on the part of the Secretary to determine to which of the bidders the contract should be awarded, and *that* question the court proceeds to answer in the affirmative. We are at a loss to know why we should have been supposed to raise that question. Our contention was that the relator's bid had been accepted in such a way as to bind the Secretary of War, and that that being the case he had no discretion about signing formal articles of agreement in compliance with Section 3744 of the Revised Statutes.

That section declares that it shall be the duty of the Secretaries named to cause and require every contract made by them * * * or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties, with their names at the end thereof, and further requires that a copy shall be filed in the Returns Office of the Interior Department, with a copy of all bids, offers, proposals and advertisements. Evidently this act had mainly in contemplation just such contracts as the one upon which we rely—those based upon competitive bids filed pursuant to public advertisement.

"It shall be the duty of the Secretary of War," is the language of the law. What is required is simply a clerical service. Given the advertisement, the specifications, the proposal endorsed thereon, the acceptance, and the blank form of contract, referred to in paragraph 25 of the specifications, anybody can from them prepare the formal articles of agreement. The minds of the contracting parties have met as to every term of the contract. Nothing has been left open. Otherwise, the contractor would not be bound, and every bidder would be as free after his proposal had been accepted, as he was before he made his bid. The acceptance of a proposal instead of closing the matter would merely bring the parties to-

gether to consider whether they could agree as to the terms of a proposed contract.

But it will be claimed, no doubt, that the Secretary has himself considered this matter, and that since he, in the performance of his duties and after proper reflection, has reached the conclusion that under Section 3744 he is not bound to execute articles of agreement in this case, the court will not interfere with this determination on his part, however it may differ from him as to the correctness of his views of the law, because that would be to attempt to control him in the exercise of a discretionary power.

A brief review of the leading decisions on this subject will show, we think, that this claim is untenable.

In 1836, Congress authorized the Solicitor of the Treasury to settle and adjust the accounts of William B. Stokes and other contractors who had had dealings with the Postmaster-General, and directed the Postmaster-General to credit them with whatever sum or sums of money, if any, the Solicitor should find to be due them on account of certain services or contracts. The solicitor awarded the contractors $161,563.89. The Postmaster-General credited them with only $122,102.46, *holding that as to the remainder of the award—$39,642.43—the solicitor had exceeded his authority under the statute.* He did not refuse to comply with the Act of Congress, but *obeyed it as he understood and construed it.* But both the Circuit Court of the District of Columbia and this court held that his construction of this act was erroneous and a mandamus issued accordingly. (Kendall *vs.* The United States, 5 Cr. C. Ct., 163; 12 Pet., 524.)

In Butterworth *vs.* Hoe (3 Mackey, 229; 112 U. S., 50) the Commissioner of Patents had decided that the relator in that case was entitled to a patent, notwithstanding adverse claims set up in an interference proceeding,

and an appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner and directed that the patent should not issue. A question was raised whether there existed any right of appeal to the Secretary, and whether the Commissioner's decision was not final. *The Secretary on great consideration, comparing and construing a number of statutes bearing on the matter, decided that he had the right to revise the decisions of the Commissioner.* In this view he was sustained by an elaborate opinion of the Attorney-General, and accordingly the Commissioner declined to issue the patent, concluding that he was bound by the decision and instructions of his superior officer. But the Supreme Court of the District in General Term found that the reasoning of the Attorney-General, and of the Secretary of the Interior, and of the Commissioner of Patents was all wrong, and by the writ of mandamus it required the Commissioner to prepare a patent and submit it to the Secretary of the Interior for his signature. That judgment was affirmed here.

In the case of The United States *vs.* Schurz, 102 U. S., 378, the question was, whether the relator was entitled to a mandamus to compel the delivery to him, by the Secretary of the Interior, of certain letters patent for a tract of public land. The relator had made application for a patent in due form, and the patent had been signed, sealed and recorded, but not delivered. In such cases, it is held that the title passes to the patentee when the patent is signed and recorded—delivery not being essential. In the particular case in question (as appears from the answer to the rule to show cause, filed therein by the Secretary of the Interior) the patent had been recorded through the oversight of a clerk, after an order had been made in the case suspending action therein; and *after a full investigation, all parties having been heard by him, he, the*

Secretary, determined that the patent should not have been signed or recorded; that other parties who had adverse and conflicting claims were entitled to the land; and that *it was his duty to cancel the patent instead of delivering it to the relator.* The Supreme Court of the District held that the relator was not entitled to the relief which he sought, but this court held otherwise, and directed that a mandamus should issue, requiring the delivery of the patent to the grantee.

The judge of a district court of the United States, after motion and full argument, concluded that he had no power to sign a judgment rendered by his predecessor, and he accordingly refused to sign such a judgment, giving his reasons for this refusal with much clearness and force. Yet this court thought he had mistaken his duty and directed that a mandamus should issue. (Life and Fire Insurance Company *vs.* Wilson's Heirs, 8 Peters, 291.)

The Supreme Court of this District has been required by mandamus to vacate a judgement which it had entered after protracted argument, and in pursuance of a very able opinion delivered by Justice Hagner, and to enter another which the judges of that court had all held to be contrary to law. (*In re* Wash. & Georgetown R. R. Co., 140 U. S., 92.)

These cases and many others, establish the proposition that the decision by an executive or judicial officer *that he has the right to exercise his discretion in a certain matter,* is not one which is binding upon the courts, and that however conscientious and careful may be his investigation, and however well-founded he may think his conclusion is, yet if the courts, upon the application of the party interested, find that, as a matter of fact, the officer had no discretion in the premises, a mandamus will issue.

In the case at bar, the Secretary of War made no

question about the advertisement having been properly published, or the proposal having been duly submitted, or the acceptance of that proposal having been regularly communicated to the relator. He proceeded upon the theory that, under Sec. 3744 there was no contract yet made and that, therefore, he could sign or not as he pleased. If this is the exercise of discretion, there will be no further occasion to apply for a writ of mandamus against executive officers of the United States. They never come into court admitting that the law requires them to do an act and saying they have concluded to disobey it. In every case in which a mandamus has been awarded, it has been a case in which the court differed with the respondent as to what was his duty.

VI.

The relator has no adequate remedy except by mandamus.

The situation here is substantially the same as in the above-mentioned cases of Butterworth *vs.* Hoe, 112 U. S., 50, and United States *vs.* Schurz, 102 U. S., 378. The title of the relator is complete and what it seeks to obtain is the proper evidence thereof. The paper which the relator holds is the letter of September 22, 1892, signed by Lieut.-Col. Gillespie, informing the relator that its proposal is accepted. The proposal itself and the accompanying papers are in the hands of the Government. There is nothing in the possession of the relator to prove that the action of Lieut.-Col. Gillespie in writing the letter in question was duly authorized by the Chief of Engineers. These facts are admitted in this case, but the rights of the relator are to be determined by the facts as they existed when he filed his original petition; and further, if the Government should not perform the con-

tract on its part, and the relator should be driven to an action in the Court of Claims for the recovery of damages, it would be at a great disadvantage in the absence of the proper evidence of its claim. It would be at the mercy of the Government.

The only other possible remedy would be an action against the Secretary of War for damages for failing to execute a formal contract as required by Section 3744. This court has twice decided that such a remedy will not defeat an application for a mandamus. (Kendall *vs.* The United States, 12 Pet., 614; United States *vs.* Black, 128 U. S., 52.)

VII.

The relator's rights are not affected by its bidding at the second letting.

The question here is not what the United States shall pay the relator for doing this work. This court is not called upon to decide whether the relator for that work is entitled to be paid $19\frac{7}{10}$ cents or $13\frac{7}{10}$ cents per cubic yard. The Government is not a party to this proceeding. This relator, if its contention here be correct, became entitled, on the 22d day of September, 1892, to have the Secretary of War prepare and sign and deliver to it a formal paper evidencing the contract which was completed on that day. Whether the relator, by its subsequent actions, has lost its right under that contract can not be determined now. The United States can not be sued here, and can not be sued anywhere without its consent, but if this relator desires to submit its claim for the six cents per cubic yard—the difference between the two contracts—either to another Secretary of War, or to the Court of Claims, or to the Congress of the United States, it is entitled to present, as a part of its case, the

formal written contract which Section 3744 requires the Secretary of War to execute. *In short, the question here is not what are the rights of the relator under the contract in question, but to what evidence of those rights is it entitled.* It has the right to be put in the position it would have occupied had Secretary Elkins executed and delivered to it formal articles of agreement under its first bid and *then* re-let the work. The War Department can not take advantage of its own wrong.

In deciding this case adversely to the relator, the Court of Appeals cites Parish *vs.* United States, 8 Wall., 489. In that case a proposal had been accepted in Louisville, *subject to the approval of the Surgeon-General*, to whom it was forwarded in Washington. The Surgeon-General approved it, and sent it by mail to the proper officer at Louisville, but before it reached him the approval was reconsidered and changes made in the contract. The claimants executed the contract as changed, protesting against the alteration. They then carried out the contract as signed. The decision of this court adverse to the claim of the contractors (apparently for damages under the contract as first prepared) is based upon the ground that there never was any valid contract except the second one.

The case most relied upon in the court below by counsel for the respondent (but which is not mentioned in the opinion of the Court of Appeals) was Silliman *vs.* United States, 101 U. S., 465. In that case certain barges of the claimant were in use by the War Department under contracts which fixed the price to be paid by the Government per month for their use. The Quartermaster-General without legal authority notified the claimant that they must execute new contracts providing for certain reduced compensation. The owner of the barges at first declined to make a new contract, whereupon the Quartermaster-General informed him that the Government would

retain the barges and withhold all compensation. Thereupon the claimant executed the new contract, stating that he did so under protest and by reason of the pressure of financial necessity. Afterwards, from time to time, without protest or objection, he received his monthly compensation at the reduced rate. In a suit brought by the owner to recover the difference between the two rates of compensation, this court held that he was not entitled to recover. The only question discussed by the court was whether the claimant, in signing the second contract, had acted under legal duress, and finding no element of duress in the case, this court said that, though the case appealed strongly to the sense of justice of the Government, giving the claimant a strong claim to relief, that relief must come from the legislative and not from the judicial department of the Government.

Neither of the above cases has any application here, because they were suits against the United States for damages under a contract which the respective claimants alleged had been changed to their injury and in such a way as not to bind them. We are not suing the United States. We are not asking for damages. The United States will not be bound or affected by the judgment in this case. We are asking that the respondent be required to perform a clerical duty imposed upon him by law. In United States *vs.* Boutwell (17 Wall., 604), this court in holding that a mandamus suit against the head of a department abates when he goes out of office, thus states the reason for its decision:

* * "What the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not

reach the office. It can not be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right."

In the subsequent case of Thompson *vs.* United States, 103 U. S., 480, which was a proceeding to obtain a mandamus against a township clerk in Michigan, this court held that the proceeding did not abate by the resignation of the incumbent and the appointment of his successor, but might be revived and continued against such successor, and in explaining the difference between that case and those in which it had been held that the suit does abate, Mr. Justice Bradley, speaking for the court, says:

"The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the Government, whose alleged delinquency was personal, and did not involve any charge against the Government whose officers they were. A proceeding against the Government would not lie."

In this very case, it will be remembered, the suit of this relator against Secretary Elkins abated in this court (26), because he had gone out of office and been succeeded by the present incumbent; and having thus held that we were not entitled to go on with the former suit because it was not a proceeding either against the War Department or the United States, but against an individual, we are confident that this tribunal will not turn us out of court now upon the ground that the suit is substantially one against the United States.

VIII.

Nor does it make any difference that a new Secretary has come into office.

Whenever such a change occurs in the head of a Department, there must be in the various bureaus thereof cases of accepted proposals where the formal contract has not been signed. If the duty to sign or to cause to be signed has devolved, under Section 3744, upon the Secretary for the time being, that duty necessarily is imposed upon his successor. It requires two parties to make a contract, and two parties are bound when it is made. Would anybody suggest that when a change of this kind occurs in such an office, all persons who have filed proposals which have been accepted are released from their obligations in case the formal paper required by the law has not been prepared?

The rule that a Government official is bound by the decision of his predecessor in particular cases has no application when the ruling refers to a mere ministerial duty. Where discretion is vested in an official and it has been exercised upon evidence submitted, his successor may decline to reopen the case except when a clear mistake has been made, or where newly-discovered evidence makes a different case. But a decision by an official that he will not comply with a statute manifestly does not give his successors any excuse for continuing in such an illegal course.

IX.

The writ of mandamus should issue as prayed in the petition.

The relator has brought its case within the principles laid down by this court as to applications for mandamus in all its decisions on this subject from Marbury *vs.* Madi-

son to Butterworth *vs.* Hoe. The court is not asked to assume or control any of the functions of the Executive or in any way to interfere with the operations or the business of the War Department. Whether the dredging of the channels of Gowanus Bay shall be done by the relator or by some other contractor, or done at all, or what price shall be paid for the work, is not the question. In that respect the discretion of the Secretary of War may not be the subject of judicial review. All that we ask is that the relator may have the written evidence of its rights which the mandate of the law makes it the duty of the Secretary of War to give to it. This is in no sense a suit against the Government. As in Marbury *vs.* Madison, and Kendall *vs.* The United States, and United States *vs.* Schurz, and Butterworth *vs.* Hoe, the duty which it is sought to enforce is purely ministerial, and is imposed directly upon the respondent by a positive statute. When a general law requires a certain thing to be done in favor of individuals, whenever a certain state of facts shall exist, and the contingency has arisen which the law contemplates, the particular individual interested has a right to relief by mandamus, just as if there had been a special statute directing the very thing to be done in respect of which he applies for the writ (Morton *vs.* Comptroller-General, 4 S. C., 430). The Secretary of War, so far as concerns the particular duty now in question, stands in the same position as would the clerk of this court if the statute required that in such a case as this he should prepare and record formal papers evidencing the completed contract. The case is like Kendall *vs.* United States, in which this court said:

"No money was required to be paid; and none could have been drawn out of the Treasury without further legislative provision, if this credit should overbalance the

debit standing against the relator. But this was a matter with which the Postmaster-General had no concern. He was not called upon to furnish the means of paying such balance if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of the court is an official act. There is no room for the exercise of discretion; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

Nor do we understand that our contention on this point is disputed, assuming that we are right in our construction of Section 3744 of the Revised Statutes. The Secretary of War held that under that section the acceptance of the relator's proposal by his authority is not conclusive because formal articles of agreement have not been executed—that until he has signed, or caused to be signed, such articles, the matter still lies within the bounds of his discretion. That this is erroneous has been shown, we think, by the words of the statute itself and by the subsequent decisions of this court in Garfielde *vs.* United States, 93 U. S., 242, and in Harvey *vs.* United States, 105 U. S., 671. The objection made to the proposal which the relator submitted that it contained such a departure from the terms of the advertisement as to authorize the rejection of the proposal is therefore not before the court. If instead of accepting the relator's proposal the War Department had thrown it out because of its alleged informalities, and the relator thereupon had asked for the interference of the courts, a very different question would have been presented; but at the most the only effect of the insertion in the relator's proposal of the clause relating to time would have been

to give the Department the right to reject its proposal on that account. When it was accepted, however, it put the relator in precisely the same position that it would have been had it in its proposal followed the very words of the specifications.

It is submitted that the judgment below should be reversed and the cause remanded to the court below with instructions to direct the issuing of a mandamus as prayed.

A. S. WORTHINGTON.
W. W. DUDLEY.
L. T. MICHENER.
Attorneys for Plaintiff in Error.

WM. NELSON CROMWELL,
WM. J. CURTIS,
of Counsel.

15-5-343

Office Supreme Court
FILED
OCT 11
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, EX REL. THE INTERNATIONAL CONTRACTING COMPANY, plaintiff in error,
v.
DANIEL S. LAMONT, SECRETARY OF THE DEPARTMENT OF WAR.

No. 689.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, EX REL. THE INTERNATIONAL CONTRACTING COMPANY, plaintiff in error,
v.
DANIEL S. LAMONT, SECRETARY OF THE DEPARTMENT OF WAR.
No. 689.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a petition for a writ of mandamus filed on December 4, 1893, in the supreme court of the District of Columbia to compel the Secretary of War to execute and deliver to the relator a certain contract for dredging. A rule to show cause having been issued (Rec., 29), the respondent demurred to the petition (Rec., 30). It was stipulated that the rule to show cause should be considered as embracing the facts set forth in the petition, and should be taken for and stand as an alternative writ of

mandamus to which the demurrer should be considered as filed (Rec., 31). The court sustained the demurrer and dismissed the petition (Rec., 32).

The relator appealed to the court of appeals of the District of Columbia, where the decision of the supreme court of the District was affirmed, Chief Justice Alvey delivering the opinion (Rec., 35). The relator brings this writ of error to reverse the judgment of the court of appeals.

The petition shows the following essential facts:

On September 14, 1892, in response to an advertisement for bids, the relator submitted to Lieut. Col. Gillespie, of the corps of Army engineers at New York, a proposal to do certain dredging in New York Harbor. On the same day Col. Gillespie recommended the relator's proposal for approval to the Chief of Engineers, who approved it on September 19. On September 22 Col. Gillespie, by direction of the Chief of Engineers, sent to the relator the following communication (Rec., 4):

> NEW YORK, N. Y., *September* 22, 1892.
>
> Mr. JOSEPH EDWARDS,
> *President of the International Contracting Company, 16 Exchange Place, New York City:*
>
> SIR: The proposal of the International Contracting Company, opened in this office September 14, 1892, for dredging channels in Gowanus Bay, New York, at 19.7 cents per cubic yard, has been accepted *by the Chief of Engineers*, U. S. Army.
>
> After the contract for the work has been prepared you will be notified to call at this office to sign it.
>
> The regulations require that any instrument executed by an incorporated company shall be under its corporate seal, and evidence should be furnished, also

under the corporate seal, as to the official character of the person by whom it is executed, and that he is duly authorized to execute the same on behalf of the corporation.

Please furnish this office with the names and addresses of your proposed sureties, each to justify in the sum of $45,000.

A memorandum is inclosed containing instructions for the preparation of contractors' bonds. The execution of the necessary bond, however, will be deferred *until the articles of agreement have been completed in every respect.*

Very respectfully,

G. L. GILLESPIE,
Lt. Col. of Engineers.

On the same day the Secretary of War called upon the Chief of Engineers for the papers relating to the matter, which were accordingly submitted to him on that day. On the following day the Chief of Engineers, by direction of the Secretary of War, telegraphed to Col. Gillespie not to proceed further with closing a contract with the relator until further instructions (Rec., 4). On October 7 the Secretary of War sent the following communication to the relator (Rec., 4, 5):

GENTLEMEN: The matter of the contract for dredging in Gowanus Bay is not yet settled, and the action of the Department upon the bids received has not yet been determined upon. It is respectfully suggested that if you desire to be heard upon the subject an opportunity is offered. Any representation you desire to make, either by writing or orally, by attorney or by any officer of your company,

will be respectfully received and considered. It is hoped that you will be able to do this by Tuesday—certainly not later than Wednesday—of next week.

The petition avers that—

> Said Secretary of the Department of War, after hearing the relator and overruling its plea and claim that he had neither power nor jurisdiction to recall or reconsider said acceptance of the relator's said proposal, refused to either execute or cause to be executed formal articles of agreement between the relator and the Government for the doing of said work in Gowanus Bay, and, on the contrary, instructed the chief of said corps of engineers not to enter into any such articles of agreement or to recognize in any way the rights of this relator under its said proposal and the acceptance thereof as aforesaid, giving as his reasons for this action :
>
> First. That said acceptance of the bid of the relator was not properly made and was not binding on the Government;
>
> Second. That said bid and the bid of the W. H. Beard Dredging Company, hereafter mentioned (which was the next lowest bid), were irregular and improper, and that neither should be accepted; and
>
> Third. That all said bids should be rejected and the work should be readvertised. (Rec., 6, 7.)

Thereupon, on October 26, the Secretary of War advertised for new bids, which were opened on December 21, 1892. The relator submitted a proposal under this second letting, accompanying it with a written communication in which it notified Col. Gillespie that it did not waive—

> in whole or in part the rights vested in it by reason of its former proposal of September 14, 1892, and

> the acceptance thereof by the War Department, and that it made its said proposal of December 21, 1892, to diminish its loss and damage by reason of the unlawful rejection of its former proposal, and because its plant for the work was already under construction under the former award, and . . . that it had begun and intended to prosecute a suit in the supreme court of the District of Columbia to assert its rights in the premises, and . . . that it would claim as part of its loss and damages, by reason of the unlawful acts of the Government and its officers, the difference between the amounts of its bids under the first and second advertisements (Rec., 7, 8).

By its proposal of December 21, 1892, the relator offered to do the work for the sum of 13.7 cents per cubic yard, as against 19.7 cents per cubic yard, the amount of its first proposal; and being the lowest bidder its proposal was accepted and a formal contract entered into and duly executed, under which the relator immediately began work, and at the time of filing the petition was engaged thereon.

The relator commenced a suit in mandamus similar to the present suit against Mr. Elkins, Secretary of War, which was abated in this court by the retirement of Mr. Elkins from office. Mr. Lamont having succeeded to the office, the relator renewed its application to him for the execution of a contract upon the basis of its first proposal. This Mr. Lamont refused to do—

> for the same reasons that my predecessor declined to enter into such a contract, and the additional reason that the International Contracting Company are now under contract to do the work for about two-thirds

the amount named in said proposal. I see no justification for entering into another contract with them, or for paying them $100,000 more than their contract calls for. (Rec., 13, and Exhibit G, Rec., 26.)

The petition prays for a writ to compel the respondent—

to execute or cause to be executed articles of agreement, . . . in accordance with relator's said proposal of September 14, 1892, and the acceptance thereof, and to permit the relator also to execute such articles of agreement, and thereupon to deliver the same to the relator.

Among the specifications of the original letting was the following:

23. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor, known as such to the Engineer Department.

The specifications also contained the following (Rec., 18):

Time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work.

The relator's proposal, on the contrary, was to complete the work, not at the time specified by the Government, but five months later, and upon other and further conditions. The proposal states that:

The plant proposed to be used is as follows:

Two combination dredges, each of a capacity of four thousand (4,000) cubic yards per day with suffi-

cient scows for the output. One of the said dredges with its scows to commence operations within 90 days of the awarding of the contract and the other dredge to commence operations nine months thereafter, and the entire work to be completed on or before June 1, 1894. In the event of an epidemic prevailing in this locality we reserve the privilege of ceasing the work until prudent to resume (Record, 19.)

The proposal does not contain any statement of an intention to build a special plant for this work.

ARGUMENT.

The judgment of the court of appeals is based upon the grounds—

1. That the action of the Chief of Engineers in accepting the relator's proposal did not conclude the Government, but was subject to review by the Secretary of War, especially in view of the fact that the relator's proposal departed from the terms of the specifications in respect to the time for doing the work, and that the United States had reserved the right to reject any and all bids.

The court also expressed the opinion that under Revised Statutes, section 3744, all steps prior to the execution of the formal contract which that section requires, even the acceptance of a proposal, are to be regarded as mere preliminary negotiations, from which the Government may withdraw at any time prior to the execution of the formal contract.

2. That the relator by making its second proposal and voluntarily entering into a contract upon the basis thereof,

is precluded from maintaining this action to compel the delivery of another contract under its first proposal for the same work.

I.

THE CHIEF OF ENGINEER'S LETTER OF ACCEPTANCE DID NOT CONCLUDE A CONTRACT, (1) BECAUSE BOTH BY ITS TERMS AND UNDER THE OPERATION OF REVISED STATUTES, SECTION 3744, IT WAS A PROVISIONAL ACCEPTANCE; (2) BECAUSE THERE WAS RESERVED TO THE SECRETARY OF WAR POWER TO DISAPPROVE AND RECALL EVEN AN ABSOLUTE ACCEPTANCE MADE BY A SUBORDINATE OFFICER.

Unless the acceptance of the relator's bid by the Chief of Engineers had the effect to conclude an agreement between the relator and the United States, the petition was properly dismissed, for the writ of mandamus will issue only where a binding agreement has been made, and nothing remains for the defendant to do but the ministerial duty of executing the paper to evidence the agreement.

The proposition that the Chief of Engineer's acceptance had such effect implies (1) that that officer had authority to bind the United States beyond the power of the Secretary of War to veto his action after it had once been taken, and (2) that the letter of acceptance was an exercise of such power, in terms concluding an agreement.

1. The opinion of the court of appeals deals with the first of these propositions, and shows that the general authority of the Chief of Engineers to conclude a contract, especially where the bid departs from the advertisement in an essential term, can be exercised only subject to the

approval of the Secretary, and that an acceptance by the Chief is ineffectual if promptly disapproved by the Secretary.

The question is not whether an acceptance by the Chief of Engineers binds the Government if no action is taken by the Secretary, but whether there is reserved to the Secretary the power to revise and recall the action of the Chief of Engineers, so as to make his action ineffectual if overruled. In *Parish* v. *United States* (100 U. S., 500, 504, 505), the court, speaking of certain action by the Assistant Surgeon-General, said:

> He was appointed for the purpose of exercising the functions of the office of Surgeon-General. He was by law the assistant to the Surgeon-General. If no virtue attached to his acts until approved by the Surgeon-General in Washington, any inferior clerk would have answered the purpose as well.

But the court added: (505)

> It is not intended to deny that he was subordinate to the chief of his bureau; could be ordered to do or not to do particular things; and *when an order made by him was disapproved it might be revoked by that officer.*

2. It seems equally clear that the Chief of Engineers' letter of acceptance, assuming that he had power to bind the Government beyond recall, was not in terms a letter which had that effect.

It was a notification, not that the United States, but that the Chief of Engineers had accepted the bid, and even as his acceptance it was made subject to the preparation of a contract and the further settlement of terms. It

stated that the company would be notified "after the contract for the work had been prepared." It called attention to a regulation of the Department requiring a certificate under the corporate seal of the company that the person assuming to act for the company had authority to do so, and concluded with the statement that the execution of the bond should be deferred "until the articles of agreement have been completed in every respect" (Rec., 4). The further settlement of terms was indeed necessary in view of the uncertainty growing out of the departure of the proposal from the specifications in the matter of the time within which the work was to be done, while the guaranty promised that the company would "enter into a contract with the United States in accordance with the terms and conditions of the *advertisement*" (Rec., 19).

The general principle of law bearing upon the subject is thus stated by Sir Frederick Pollock (Wald's Pollock on Contracts, 24):

> It may happen that though the parties are, in fact, agreed upon the terms—in other words, though there has been a proposal sufficiently accepted to satisfy the general rule—yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. If such be the understanding between them, of course they are not to be sooner bound against both their wills. "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." Whether such is in truth the understanding is a question of fact which depends on the circumstances of each particular case.

Among the circumstances of this case, affecting the determination of the question presented, it must be remembered that Revised Statutes, section 3744, makes it—

> The duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties, with their names at the end thereof.

In *South Boston Iron Co.* v. *United States* (118 U. S., 37) there was a definite acceptance in writing by the Secretary of the Navy of a specific proposition to do certain work, and yet the court (p. 42), in view of this section, held, affirming *Clark* v. *United States* (95 U. S., 539)—

> That the papers relied on for that purpose are nothing more in law or in fact than a preliminary memorandum made by the parties for use in preparing the contract for execution in the form required by law. This was never done, and therefore the United States never became bound.

Harvey v. *United States* (105 U. S., 671), relied upon by the relator, is not in conflict. That case decides merely that in a suit to reform a formal contract, the proposal and acceptance are competent evidence of the intention of the parties, when it is shown that by accident or mistake the real agreement has been wrongly stated in the formal contract.

Garfielde v. *United States* (93 U. S., 242), cited by the relator, is not in point, because the contract there was not with either of the three Departments mentioned in section 3744, but with the Post-Office Department.

II.

THE RELATOR, HAVING MADE A SECOND PROPOSAL, AND VOLUNTARILY ENTERED INTO A CONTRACT BASED THEREON, IS PRECLUDED FROM MAINTAINING THIS ACTION TO COMPEL THE DELIVERY OF A CONTRACT UNDER ITS FIRST PROPOSAL FOR THE SAME WORK.

The second contract was voluntarily entered into. There was no duress. (*Silliman* v. *United States*, 101 U. S., 465, 470.) The two lettings were clearly inconsistent. If an absolute right to a formal contract and to perform the work was vested in the relator by virtue of its first proposal and the alleged acceptance thereof, the remedies of mandamus and injunction were open to it (*Board of Liquidation* v. *McComb*, 92 U. S., 531, 541), the one to compel the execution of the contract, the other to enjoin proceedings under the intended second letting, and he should have tendered performance.

So far, however, from any such action the relator bid upon the second letting, agreeing to do the work for a much less sum than it had originally offered, executed a formal contract in pursuance of its second proposal, and entered upon the execution of such contract.

The relator could not, by an accompanying protest, retain the right to claim that the second letting was unlawful and of no validity, and at the same time by its acts in bidding, contracting, etc., recognize the proceedings *as legal*. As said by counsel in *United States* v. *Adams*, 7 Wall., 463, 475 (1868):

> If one does an act having a fixed and necessary legal operation, his protest accompanying that act

> that he does not do it can have no effect. He does it, and saying that he does not is futile.

In that case the court held a protest accompanying a receipt of money, asserting that the money was received without waiving the right to claim that an additional sum was still due and owing, ineffective.

In *Parish* v. *United States* (8 Wall., 489), Mr. Justice Field said (p. 490):

> If the claimants had any objections to the provisions of the contract they signed they should have refused to make it. Having made it and executed it their mouths are closed against any denial that it superseded all previous arrangements.

In *Silliman* v. *United States* (101 U. S., 465), barges were in the service of the United States under valid unexpired charter parties. The Quartermaster-General nevertheless demanded that the owners should execute new charter parties at reduced compensation. They declined at first and made demand for return of their barges, which was refused. On learning the intention of the Quartermaster-General to retain possession of the barges and withhold all compensation, the owners executed new charter parties at reduced rates, as required by the Quartermaster-General, stating at the time that they did so under protest by reason of the pressure of financial necessity. This court, nevertheless, held that the second contract superseded the first, and that, having made the second, the owners could not maintain an action under the first.

But, even assuming that the first acceptance bound the Government, and that the voluntary execution of a sec-

ond contract does not affect the relator's right to recover damages, there is still no right to a writ of mandamus, for the relator's claim is for damages only.

To order the execution of a contract pursuant to the terms of the first proposal and acceptance is to require the parties to enter into an agreement *in form* which is impossible of execution and false and misleading in its provisions, for the subject-matter is covered by a contract now in process of execution.

In *State ex rel. Phelan* v. *Board of Education* (24 Wis., 683, 685) it was held that—

> The writ of *mandamus* being a discretionary writ, the fact that a contract has actually been awarded to another is sufficient to induce the courts to decline to interfere to further complicate the matter, even though they might otherwise have done so.

There is no analogy between the case of a refusal to deliver a patent for an invention after the legal title to the invention has vested in an individual (*Butterworth* v. *Hoe*, 112 U. S., 50), or a refusal to deliver a patent for land when the legal title to the land has vested (*United States* v. *Schurz*, 102 U. S., 378), the patent being in such cases the proper and essential evidence of the claimant's vested property rights under *a complete and executed transaction*, and the case at bar, where it is sought to compel the execution of an *executory* contract, and where, also, if any right has vested in the relator it is simply a *right of action*, the evidence of which is in writing, in the shape of a proposal and acceptance.

There can be no right in relator to the formal contract *for the purpose of executing its terms*, for the work is now

actually being completed by the relator under a subsisting and different contract from that which is attempted to be forced into being. If the relator wishes the contract not for the purpose of executing it, but merely as evidence, as it suggests, mandamus is not the appropriate writ.

I respectfully submit that the judgment should be affirmed.

LAWRENCE MAXWELL, JR.,
Solicitor-General.